SINGLE APPENDIX

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, vs. **THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.**	**CIVIL ACTION No. W-4730**

RELEVANT DOCKET ENTRIES

1971

Nov 8 COMPLAINT, with Appendix "A" and Appendix "B", filed.

Nov 22 ORDER, filed and ENTERED: David T. Lewis, Chief Judge, U.S. Court of Appeals, Tenth Circuit: Having been notified that this action is one which may be required by an act of Congress to be heard and determined by a District Court of three judges: IT IS ORDERED that the Court shall be constituted as follows: Honorable James E. Barrett, United States Circuit Judge; Honorable Frank G. Theis, U.S. District Judge; and Honorable Earl E. O'Connor, U.S. District Judge.

Nov 24 MOTION to Intervene as Parties Defendant, filed by The Atchison, Topeka and Santa Fe Railway Company; Baltimore and Ohio Railroad Company, et al.

Dec 2 At Wichita: THEIS & O'CONNOR: Motion of railroads to Intervene: SUSTAINED.

Dec 16 MOTION for Leave to Intervene, filed by Earl L. Butz, Secretary of Agriculture of the United States, with proposed Complaint.

Dec 17 ORDER, filed and ENTERED: THEIS, Judge: ORDERED that the Secretary of Agriculture of the United States is permitted to intervene in this action as a party plaintiff.

Dec 17 COMPLAINT, filed by intervening plaintiff, Earl L. Butz, Secretary of Agriculture of the United States.

Dec 17 Separate ANSWER of Intervenor-Defendants The Atchison, Topeka and Santa Fe Railway Company, et al, to Complaint of the Wichita Board of Trade, et al.

Dec 21 ORDER, filed and ENTERED: BARRETT, THEIS, & O'CONNOR, Judges: ORDERED that the motion to intervene as parties defendant of the Western Railroads is SUSTAINED.

1972

Jan 3 Separate ANSWER of Intervenor-Defendants The Atchison, Topeka and Santa Fe Railway Company, et al, to Separate Complaint of Earl L. Butz, Secretary of Agriculture of the United States, filed.

Jan 10 ANSWER of the Interstate Commerce Commission, filed.

Jan 12 ANSWER of the United States of America to the complaint and the intervening complaint, filed.

Jan 17 ANSWER of the Interstate Commerce Commission to the Complaint of Intervening Pltf. Earl L. Butz, Secretary of Agriculture of the United States, filed.

Mar 28 At Wichita: Judges BARRETT, THEIS, & O'CONNOR: Hearing and Argument. Taken under advisement.

May 24 OPINION OF THE COURT, filed and ENTERED; BARRETT, THEIS, & O'CONNOR, Judges: The matter is remanded to the Interstate Commerce Commission for further proceedings consistent with this opinion. The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court.

May 26 Intervening-Defendants' Motion for Correction of Opinion, filed.

May 31 MOTION of Interstate Commerce Commission for Amendment of Opinion, with attached Memorandum in Support of Motion of Interstate Commerce Commission for Amendment of Opinion, filed.

Jun 2 Memorandum of Plaintiffs in Opposition to Motions of the Interstate Commerce Commission and Intervening Defendants for Amendment of Opinion, filed.

Jun 8 OPINION OF THE COURT, filed and ENTERED; BARRETT, THEIS & O'CONNOR, Judges: Previous Opinion affirmed and defendants' motion of Correction of Opinion denied.

Jun 9 NOTICE OF APPEAL (filed by Atchison Topeka & Santa Fe Railway) to the Supreme Court of the United States from the Opinion made and entered on 5/24/72 and from the final order and judgment of the Court affirming the previous Opinion and denying defendants' Motion for Correction of Opinion made and entered on 6/8/72. (Copies to Mr. E. Robert Seaver, Clerk, Supreme Court of the U.S.; three judges and all counse

Jun 9 MOTION for Stay of Judgment pending final disposition of appeal, filed by deft. intervening railroads. (Copy to three judges)

Jun 14 Reply to MOTION for Stay of Judgment, filed by pltfs. (Copy to three judges).

Jun 19 Memorandum of the Interstate Commerce Commission Concerning Intervening Defendants' Motion for Stay of Judgment, filed.

Jun 19 At Kansas City; THEIS & O'CONNOR, Judges: Intervening defts' motion for Stay of Judgment: Overruled.

Jun 22 ORDER, filed and ENTERED; BARRETT, THEIS, & O'CONNOR, Judges: ORDERED that the defendant railroads' motion for a stay of execution is overruled and denied.

Jun 26 Record on Appeal mailed to Clerk, Supreme Court of the U. S., Washington, D.C. Copy of transmittal letter with copy of index mailed to all counsel.

Jul 12 Certified copy of ORDER from the Supreme Court of the United States, their Application No. A-1320, filed and ENTERED: It is ORDERED that, subject to the condition set forth in paragraph 2 herein, the judgment of the U.S. District Court for the District of Kansas entered in this matter on 6-8-72, be and hereby is stayed pending a final determination of the appeal by this Court.

Jul 20 NOTICE OF APPEAL to the Supreme Court of the United States from the opinion of May 24, 1972 and from final order affirming the previous opinion and denying motion for correction filed June 8, 1972, filed by the Interstate Commerce Commission. (Copy to Clerk, Supreme Court of the United States, all counsel and to the three judges)

Aug 9 Certificate from the Supreme Court of the United States, evidencing that the case has been docket in that Court, as No. 72-214, and is now pending, filed.

APPENDIX B

It has been determined by the Commission that this proceeding involves an issue of general transportation importance. Thus, under the provisions of section 1.101 of the General Rules of Practice, parties of record dissatisfied with the decision may file a petition for reconsideration by the Commission.

Served April 21, 1971

30553

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided April 16, 1971

Proposed new or increased charges for in-transit inspection of grain at various points in the United States found just and reasonable and otherwise lawful. Proceeding discontinued.

Martin W. Cassell, William F. Cottrell, John A. Daily, Harry L. DeLung, Jr., Richard S. M. Emrich III, Louis A. Harris, Roger K. Johnson, Richard W. Kienle, Howard D. Koontz, Charles N. Marshall, Christopher A. Mills, Howard E. Roos, and *Richard J. Schreiber* for respondents.

Richard H. Stokes and *George M. Onken* for intervener supporting respondents.

John Miles Powell for the Secretary of Agriculture of the United States, protestant.

John M. Agrey, C. L. Brennan, William F. Brooks, Williad R. Clarkson, S. O. Cowley, J. M. Cranor, W. T. Drannan, W. Boyd Evans, Jack Glaves, Melvin M. Gradert, Robert L. Graves, Jon C. Hanson, C. J. Harriss, R. R.

Hughes, W. H. Hollan, James J. Ireland, Rodman Kober, William J. Keating, George W. Lehnen III, C. G. Mathews, C. A. Poelker, Jr., Frank E. Polom, Jerry T. Ratledge, Daniel J. Sweeney, and *Henry J. Yunck* for other protestants.

REPORT AND ORDER

DIVISION 2, COMMISSIONERS WALRATH, JACKSON, AND BREWER

WALRATH, *Commissioner:*

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a hearing examiner's report and recommended order. Requested findings not specifically discussed in this report nor reflected in our findings and conclusions have been considered and found not justified.

By schedules filed to become effective March 28, 1970, and later, the Traffic Executive Association of Eastern Railroads, together with other rail publishing agents and individual rail carriers, proposed to establish new or increased charges for the first in-transit inspection of grain and grain products at points in the United States. Upon the protest of interested shippers and other parties, the proposed schedules were suspended by the Commission, Board of Suspension, to and including October 27, 1970. A joint petition of the respondent rail carriers, filed April 16, 1970, for reconsideration and vacation of the order of suspension was denied by the Commission, division 2, on May 21, 1970. Respondents have voluntarily postponed the effective date of the schedules to April 24, 2971.

By order dated April 7, 1970, the Commission prescribed special rules of procedure and assigned the proceeding for hearing before a hearing examiner. Hearings were held July 13 to July 22 and August 13 and 14, 1970, in Washing-

ton, D.C., and in Chicago, Ill., July 27 through August 4, 1970. Briefs were filed October 12, 1970.

The Long Island Rail Road Company intervened in support of respondents. Numerous protests were filed against the proposed schedules and many of the protestants are active participants in this proceeding. They include the Secretary of Agriculture of the United States, State Corporation Commission of the State of Kansas, Missouri Department of Agriculture, North Dakota Public Service Commission, the Boards of Trade at Kansas City, Mo., and Chicago, Ill., and grain exchanges at Omaha, Nebr., Minneapolis, Minn., Sioux City, Iowa, St. Louis, Mo., and Fort Worth, Tex. Appearances were also made by the National Grain Trade Council and the National Grain and Feed Dealers Association on behalf of their members and by representatives of a number of individual grain concerns such as the Continental Grain Company and Garvey, Inc. The latter has extensive grain interests in Kansas, Texas, Illinois, and North Dakota.

In-transit inspection has reference to the practice of stopping railroad cars loaded with grain and grain products, including soybeans, and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the railroad car. The indicated inspection is the taking of a representative sample or samples to determine the official grade of the contents of the car for the purpose of establishing value of the commodity at the market. It does not include any inspection on tracks of the shipper at either origin or destination. The charges[1] per car for in-transit

1. Charges stated herein are subject to *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, and subsequently authorized general increases.

inspection, under currently effective tariffs, are as follows:

	First stop	Second and subsequent stops
Within eastern territory	$7.42	$13.29
Within Illinois territory	None	14.33
Within southern territory	None	12.51
Within western territory: Border markets along the Mississippi River and northern Illinois.	None	14.33
Within western territory: On and east of the Missouri River markets, also Minneapolis-St. Paul, Duluth-Superior and points east thereof.	None	13.78
Within western territory: West of the Missouri River including southwestern territory, and west of Minneapolis-St. Paul and Duluth-Superior.	None	13.36

The proposed per-car charges for each stop, including the first stop, on the rail carriers' tracks for inspection are (1) within Eastern, Illinois, and Southern Freight Association territories— $14.33; (2) on and east of the Missouri River markets, also Minneapolis-St. Paul, and Duluth-Superior and points east thereof— $13.78; and (3) west of the Missouri River, including southwestern territory, and west of Minneapolis-St. Paul and Duluth-Superior—$13.36. It should be stressed that the in-transit inspection is primarily an operation in the West. Respondents' studies indicate that there were 464,000 inspections on 16 western railroads in 1968 and 488,000 on 15 western railroads in 1969. There was a much smaller number of inspections in the East and the South. In the South, inspection on carriers' tracks is regularly performed at only four locations, all of which are export ports.

Background.—A brief description of production and marketing of the considered commodities, their importance to the Nation's economy and to the railroads, and the significance of the transportation charges is helpful to an under-

standing of the issues presented in the instant proceeding.[2]

For the most part, the various grains[3] are grown in the farming or agricultural States that form a rough crescent from Ohio in the east through to Montana, Idaho, Oregon, and Washington, in the west and around to Oklahoma and Texas in the Southwest. The greatest production of wheat is found in Colorado, Kansas, Nebraska, North Dakota, Montana, Oklahoma, Oregon, and Washington. Corn and oats are produced in large quantities in Iowa, Nebraska, Minnesota, Missouri, Illinois, Indiana, and Ohio. The sorghum production is heaviest in Texas, Kansas, and Oklahoma, and soybeans are grown principally in Illinois, Indiana, Ohio, and Arkansas.

The total amount of grain grown in these States is substantial. The 1969 estimates show that total grain production in Iowa is in excess of 1.2 billion bushels and Kansas and Nebraska are each shown to have produced more than 600 million bushels. Some 300 million bushels were produced in Missouri and the yield of both Montana and Washington during the same year was in excess of 100 million bushels. Oklahoma and Texas are also producers of large quantities of grain. The former's wheat production in 1969 exceeded 100 million bushels and Texas produced nearly 70 million

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2. A more detailed description is available in two general investigations instituted by the Commission pursuant to a resolution of the Congress. The first was directed to the railroad movement of grain and grain products within the western district and for export and is reported in *Grain and Grain Products*, 205 I.C.C. 301, and 215 I.C.C. 83. This proceeding is sometimes referred to in this report as docket No. 17000, Part 7. The second concerned the movement of the same commodities in the South and is set forth in *Grain To, From, and Within Southern Territory*, in 259 I.C.C. 629. There is also a more recent summary in *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967).

3. Grain, unless otherwise indicated, includes corn, wheat, oats, barley, rye, sorghums, and soybeans.

bushels of wheat and more than 300 million bushels of sorghum grains. There is also a substantial production of grain, particularly corn and soybeans, in Illinois and Indiana. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) transported more than 3,700 carloads of Illinois corn and nearly 700 carloads of Illinois soybeans in 1969. The Chicago and North Western Railway Company (C&NW) originated approximately 5,000 carloads of corn and 1,000 carloads of soybeans in Illinois during the same year.

Enormous quantities of grain move from the country origin points to the nearest price-fixing or first markets. The Missouri River markets of Sioux City, Omaha, Atchison and Leavenworth, Kans., and St. Joseph and Kansas City, Mo., serve the producing areas west thereof, and, with the gulf ports, grain from the southwestern States. Duluth, St. Paul, and Minneapolis, Minn., and Superior, Wis., act in the same capacity on the easterly flow of grain from producing areas in the Dakotas, Montana, and Minnesota. Chicago and St. Louis are important first markets for grain grown in the producing areas east of the Missouri River.

Receipts at Chicago are indicative of the importance of the grain markets. In 1969, slightly more than 194 million bushels of grain were received there, of which approximately 98 million were delivered by railroad. Some 81 million bushels were delivered by truck and about 15 million bushels were delivered via water carriers. The grain receipts at the other markets are also substantial.

The grain traffic is extremely significant tonnage for the railroads, particularly those in the West. In 1969, the Chicago and North Western Railway originated 118,348 carloads of grain. This reflected 8.6 percent of their total carload traffic and 11.83 percent of total carload gross freight revenues. The railroads that merged to form the

Burlington Northern (BN) carried some 20.5 million tons of grain in the same year, which represented 13.2 percent of the gross tons of all their carload freight traffic. The revenue earned for handling this tonnage was $117.7 million and constituted 14.9 percent of gross revenues. The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) for 1968 showed that the movement of wheat and sorghum grains accounted for 6.63 percent of its total revenue and 12.1 percent of total tonnage carried. Similar figures are submitted by the other western railroad respondents and, while tonnages and revenues varied, grain traffic is shown to be particularly significant in every instance.

The rate structure applicable to the railroad movement of grain and grain products from the West to the East and Southeast differs from that applied in connection with other commodities. For the purpose of this report, it is sufficient to state that the freight charges are generally determined from the application of combination rates composed of gathering rates to the price-fixing or first markets and proportional rates beyond. This rate structure is described in the Commission proceedings[4] mentioned earlier. Under the structure, certain services are historically provided by the railroads. One such service is transit, which is the privilege of stopping a grain shipment prior to final destination for storage or processing with later reshipment to destination at freight charges for the entire movement no higher than the charges assessed for uninterrupted movement from origin to destination. Another such service is inspection and sampling. Until recently, official inspection was required by Federal statute. Both transit and inspection were authorized originally without any additional charge. Separate or additional charges for transit and inspection services, however, have been assessed in recent

4. *Grain and Grain Products*, 205 I.C.C. 301, 215 I.C.C. 83, and Rate Structure Investigation, Part 7, *supra*.

years in connection with particular movements of grain and grain products under specific rates, and, in the East, a separate charge for the first inspection of a carload of grain was established in 1963. However, the practice in the western district has been to permit the first inspection without any charge. The proposed schedules, if they become effective, will change this practice.

For many years, the railroads that originated substantial quantities of grain have made provision for sampling and inspection while the loaded cars were in transit. The provisions of the Federal statute requiring an inspection to establish the official grade could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been unloaded. However, as a practical matter, it was easier for the grain trade if the samples on which inspection is made were drawn from the loaded railroad car and the inspection completed before the grain was unloaded. This was established as the practice and the Commission approved and provided for the continuance of the in-transit inspection at the line-haul rates in *Grain and Grain Products, supra.* There has been some erosion of the rail carrier practice of providing for the inspection in transit. This has been true where the railroads have established special reduced rates for particular movements of grain. However, the Docket No. 17000, Part 7, maximum rates which have limited application in the West, and the currently effective rates for general application which are on a lower level than the prescribed basis, continue to authorize the transit and inspection services that have long been available to the grain shippers. Where Docket No. 17000, Part 7, maximum rates are applicable, the charges proposed here do not apply. Nor will the charges apply where the line-haul rates plus the inspection charge equals or exceeds the maximum prescribed level. Thus the prescribed level will not be exceeded under this proposal.

The issue before the Commission in this proceeding is whether or not the proposed departure from the established practice of providing the inspection service is just and reasonable. The grain shippers continue to make extensive use of the prevailing in-transit inspection service, and if the proposed charges become effective it will result in either increased cost to the shippers or in modification of current practices.

Prior to 1967, the United States Grain Standards Act provided that all interstate movements of whole grains, sold by grade and shipped to or from designated markets, be inspected for the purpose of determining their official grade. This provision was originally designed to protect the purchasers of grain. However, beginning sometime in the early 1960's it became apparent that the requirement of mandatory inspection of interstate grain movements had ceased to serve its original purpose. The increasing diversion of bulk grain movements from railroad to other transportation modes, particularly to motor trucks, rendered uniform enforcement of the mandatory inspection requirement difficult. In-transit services are not available by other modes of transportation. In addition, a part of the grain trade found it expedient to market grain without benefit of official grade determination by the U.S. Department of Agriculture. For these reasons the U.S. Secretary of Agriculture proposed the 1968 revision of the Grain Standards Act which eliminated the mandatory inspection. The primary objective of the revision was to expedite and simplify the movement of whole grains. The railroad industry supported the elimination of the inspection requirement because they believe such action would improve car utilization. They were supported in this position by some Federal and State agencies.

Several of the protestants objected to the receipt of evidence submitted by the respondent railroads purporting to show that improved car utilization was a major objective

of the 1968 revision. They have renewed their objection in briefs contending that the hearing examiner improperly received evidence of the legislative history of the revised act including testimony of witnesses before congressional committees. The evidence was properly received by the examiner and his ruling is affirmed. Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute. However, it is equally clear that improved car utilization in the movement of whole grain by railroad was a consideration in the revision.

Need for in-transit inspection.—Before looking to the level of the proposed charges in relation to the services performed in connection therewith, and the corollary question directed to the inclusion of the cost for such services in the line-haul rates, it is helpful to examine into the present need for in-transit inspection. An important segment of the opposition is based on the proposition that such inspection is essential to the orderly marketing of whole grains and that the substitute or alternative inspections at origin or destination, advocated by the respondents, is unacceptable to the grain trade for a number of reasons. The respondent carriers, while urging that the overriding justification for the proposed schedules is the critical need for improvement of car utilization, submit that there is no longer any real necessity for the in-transit inspection service.

We have noted that there is a substantial use of the considered inspection service, especially in the West. Some grain shipments even received two in-transit inspections without the imposition of any additional charge. Generally, the tariffs applicable to the movement of grain in the West provide for only one inspection without charge and there is a published charge for the second and subsequent inspections. However, in addition to the one free inspection

allowed under the currently effective tariffs, an additional free inspection is permitted at destination where the car is unloaded in lieu of reconsignment.[5] Under the suspended tariffs, a charge would be made in the West for both an intermediate inspection and a destination inspection while on the carriers' tracks. Both inspections are in transit since the car is stopped and held out of its otherwise normal course of movement.

There is a need for a sampling and inspection of the grain at some time during the marketing process. The grade of the particular shipment must be determined before the majority of sales can be consummated. For a number of reasons it has been convenient for grain shippers and receivers to have the grain inspected while in transit. If a variance of the grade from what was offered is shown by the inspection, the shipment can be reconsigned to more appropriate markets. Also, there is less chance of deterioration of the grain following the in-transit inspection than is the case if the inspection is made earlier at the point of origin. Finally, the possibility of bias is lessened if the inspection occurs after the shipment leaves the origin elevator. These factors, along with the mandatory requirement for inspection, were the basis for providing the in-transit inspection originally, and for the Commission's approval of the practice in its reports in the Docket No. 17000, Part 7, proceedings. These are also the factors stressed by protestants in urging that origin and destination inspections are not acceptable to the grain trade. However, it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad. As noted, the inspection is now permissive and it

5. A study by the western railroad respondents in 1967 established that there was an average of 1.6 inspections per shipment. Consequently, a large number of inspections for 1968 and 1969 are duplications or repeat inspections.

can take place elsewhere. The record in this proceeding shows that there is a substantial growth in the use of origin mechanical sampling for inspection. These relatively low-cost samplers[6] are installed in the existing elevator grain spout and are electronically timed and operated. A representative sample of the grain being loaded in the rail car is obtained and taken to an inspection laboratory for analysis and grading. The origin sampling devices are approved under existing regulations of the U.S. Department of Agriculture.

The authorized samplers in Iowa increased from 33 to 75 between August of 1969 and the same month in 1970. During the same period, in Illinois, the number increased from 7 to 15; in Nebraska from 27 to 53; and in Kansas from 11 to 25. This growth is not sufficient as yet to result in a decline in the number of in-transit inspections on the railroads, but the increase in the number of automatic samplers at the origin elevators does show that this method of inspection does not adversely affect the grain marketing process.

The basic responsibility of the railroads does not require them to provide the service for in-transit inspection. The fact that the carriers have provided such service, and have included the cost thereof in their line-haul rates, does not preclude a change or modification of the practice if circumstances justify some revision. Therefore, we conclude that the service made available by the railroads in connection with in-transit inspection is not shown on this record to be essential to the grain marketing process. The in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination. There are numerous shipments of the grain where in-transit inspections are not performed. Grain in-

6. The record shows installation cost to range from $1,000 to $2,000.

spection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed. See *Grand Forks Cham. of Com.* v. *Great Northern Ry. Co.*, 321 I.C.C. 356. Whether the separate charges proposed herein are just and reasonable requires a more extended review of the evidence submitted.

Respondents.—The railroads offer a two-pronged justification for the proposed charges. The asserted primary objective to be attained under the proposed charges is a substantial increase in car utilization through elimination of the delay time required for inspection with a resultant improvement in the critical car shortage. In fact, in brief, the respondents state that "the railroads do not want to collect one penny of the charges proposed." The considered charge is proposed as an incentive to shippers to forego in-transit inspections. Secondly, the respondents, having in mind the burdens that must be met in a proceeding directed to increased charges, attempt also to show that the cost directly related to the performance of the inspection exceeds the charges proposed to be assessed for such service.

Respondent carriers submitted evidence of the decrease in the ratio of revenues to out-of-pocket costs for the movement of whole grains from 218 percent in 1950 to 149 percent in 1966. This data compiled from waybill statistics cost scales, and related publications of the Commission's Bureau of Economics and Bureau of Accounts, are reflected in the following table:

Year (1)	Revenues (2)	Out-of-pocket cost (3)	Ratio of revenue to out-of-pocket cost (4)
			Percent
1950	$3,566,568	$1,637,840	218
1955	4,119,817	2,039,467	202
1960	4,946,158	2,877,519	172
1966	5,205,729	3,490,094	149

The figures in the table represent a 1-percent sample of rail terminations on all grain traffic.[7] Figures later than 1966 are not available. The purpose of the table is to illustrate that during the last 20 years the rates on grain moving by railroad have been reduced and, consequently, the contribution of this traffic to the overhead burden has been lessened due to the reduced rates and increasing cost of operations. Most of the reductions were made by the railroads to meet the increased competition of the motor trucks and barges. The respondents followed procedures used by the Commission's cost finding section to determine the out-of-pocket costs for 1966. Those for the prior years were taken from so-called contribution studies of the same section.[8]

A number of studies were presented by the respondents which purport to show their costs for performing the in-transit inspection. The following cost items are listed by respondents as those created and possibly avoidable by the elimination of grain inspection at in-transit stops on the railroads: (1) car detention and associated car costs, (2) cost of switching the cars to inspection tracks on the railroads, (3) clerical costs associated with inspection, (4) loss and damage costs, (5) excess per diem costs, (6) costs that result from delays in handling other traffic because of cars held for inspection, and (7) costs associated with backhaul movements to provide for inspection.

The first step was to determine the amount of car detention that resulted from stopping the grain cars for inspec-

7. The figures shown in the table should be multiplied by 100 to obtain total figures.

8. Distribution of Rail Revenue Contribution by Commodity Groups, 1960, 1955, 1950.

tion. Five studies were made and they are summarized in the following table:

Summary of all car detention studies

Line	Study carriers	Average delay due to grain inspection	Weight-of-the-evidence considerations		
			Method of selecting study stations	Time period of the study	Annual inspection volume (number of inspections)
(1)	(2)	(3)	(4)	(5)	(6)
		hours			
1	Western	78.01	Random ...	1 year	476,000
1	Eastern	44.91	Judgment ..	3 to 8 months	24,500 (Penn Central only)
3	Northern Pacific.	68.00	Judgment .. (nearly a census)	10 months	8,035 (10 months only)
4	Great Northern—Great Falls.....	92.30	Judgment ..	1 week	Unknown
5	Great Northern—Spokane-Hill yard	92.90	Judgment ..	1 week	Unknown

Because the Western study was based on a random sample, covered the period of 1 full year (1968), and had application to the greatest number of inspections, the respondents contend that it should be accorded the greatest weight. In the Western study, 18 study stations[9] were selected at random from the complete list of 217 stations where grain inspection occurred in 1968 on the 16 western railroads[10] that participated in the study. At each of the

9. They are listed in appendix B.

10. Atchison, Topeka and Santa Fe Railway Company (Santa Fe); Chicago, Burlington & Quincy Railroad Company, The Colorado and Southern Railway Company, Fort Worth and Denver Railway Company (these three are now a part of Burlington Northern); Chicago and North Western Railway Company (C&NW); Chicago Rock Island and Pacific Railroad Company (Rock Island); The Denver and Rio Grande Western Railroad Company (Rio Grande); Illinois Central Railroad Company; Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee); Missouri Pacific Railroad Company; Texas and Pacific Railway Company; St. Louis-San Francisco Railway Company; Southern Pacific Company, and Union Pacific Railroad Company.

18 study stations, a simple random sample of inspected cars and a simple random sample of uninspected cars was chosen.[11] The difference in average handling times between inspected cars and uninspected cars at each station is the delay time due to grain inspection at that station. Eighteen delay times were obtained for grain inspection, one delay time for each study station. These 18 delay times were then combined using a weighted average formula to obtain the result shown in the table.

From the beginning the two groups of cars at each station were made comparable in four respects: year, commodity, station, and method of arrival. A group of inspected cars was compared with a group of uninspected cars that moved in the same year, carried a grain subject to the proposed charge, were handled at the same station, and arrived on a road train of the reporting carrier. Subsequent to the start of the study, an adjustment was made based on segregating all study cars into one of three movement types—delivered at the study station, moving through the study station but taking an intertrain switch to do so, and moving through the study station on the same train. Respondents assert that the figure of 78.01 hours is based on groups that are comparable in five respects: year, commodity, station, method of arrival, and type of movement. The results are shown in appendix B.

Respondents used this adjusted delay time (78.01 hours) to determine the cost of the delay for an inspection of a grain car in the western district. This cost was computed on several bases as outlined in the following table:

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11. In two cases (inspected cars at Belmond and Stockton), there were less than 100 cars and for these, every car was studied. In the other 34 cases, samples of approximately 100 cars were used.

Using adjusted delay time of 78.01 hours or 3.25 days

Cost groupings[1] (1)	Days detention (2)	Cost per day (3)	Total cost per inspection (4)
I	3.25	$3.12	$10.14
II	3.25	2.56	8.32
III	3.25	2.79	9.07
IV	3.25	2.24	7.28
at 1. *Standard error*			
I high	3.59	3.12	11.20
low	2.91	3.12	9.08
II high	3.59	2.56	9.19
low	2.91	2.56	7.45
III high	3.59	2.79	10.02
low	2.91	2.79	8.12
IV high	3.59	2.24	8.04
low	2.91	2.24	6.52

1. Explanation:

I. Car costs based on per diem procedure including 6-percent return on freight train cars.

II. Car costs based on per diem procedure including a 4-percent return on freight train cars.

III. Car costs were determined by the application of Rail Form A including a 6-percent return on freight train cars.

IV. Car costs were determined by the application of Rail Form A including a 4-percent return on freight train cars.

As indicated earlier, there were other studies of the detention time for the in-transit inspections which the respondents urge corroborate the costs shown in the above table. The results of such studies are shown below:

Study carriers (1)	Days detention (2)	Cost per day (3)	Total cost per inspection (4)
1. Eastern carriers	1.87	$2.76	$ 5.16
2. Northern Pacific	2.833	2.63	7.45
3. Great Northern—Great Falls	3.84	3.52	13.52
4. Great Northern—Spokane-Hill yard	3.87	3.52	13.62

The other item of cost determined by the respondents was switching. Respondents determined that the inspected grain

cars require on the average an additional 8.39 minutes of switching. This covers removal of the car from the inbound train to the inspection hold tracks, any additional switching on the hold tracks and finally the removal of the car to either the outbound train or to an industry switch. This study embraced 11 stations in the western district and is reflected in the following table:

Final results of the western carriers' switching studies

Railroad (1)	Station		Switch engine minutes per carload (4)
	City (2)	State (3)	
MILW	Aberdeen	S. Dak.	3.52
ATSF	Atchison	Kans.	4.20
CRIP	Belmond	Iowa	9.89
SP	Colton	Calif.	23.17
CNW	Huron	S. Dak.	3.29
IC	Iowa Falls	Iowa	6.28
BN	Lincoln	Nebr.	2.04
UP	Omaha-Council Bluffs	Nebr.-Iowa	5.50
MP	St. Joseph	Mo.	3.20
UP	Spokane	Wash.	14.99
BN	Superior	Nebr.	11.67
	Weighted average		8.39

The stations in the table were considered to be representative with respect to, (a) the number of railroads considered, (b) geographic dispersion, (c) dispersion among statistical strata, and (d) range in volume of traffic. The period of study was 7 consecutive days at each of the 11 stations. The engine minutes produced by the study for the actual movement of the inspected cars were increased to include nonproductive time charged to switching operations. The out-of-pocket costs per engine minute were developed for all of the 16 western railroad respondents combined through the application of a Rail Form A for the year 1969. The results are shown in the following table which also includes computations presented by the eastern railroads respondents and those made by studies submitted on behalf of individual respondents.

Cost of additional switching required for grain inspection

Carriers (1)	Added switch engine minutes (2)	Cost per engine minutes (3)	Total cost of switching (4)
1. Western railroads	8.39	$0.76070	$6.38
2. Eastern railroads	10.30	0.76206	7.85
3. Northern Pacific	4.906	0.803	3.94
4. Great Northern—Great Falls	12.65	0.6559	8.30
5. Great Northern—Spokane-Hill yard ..	9.60	0.6683	6.42

No attempt was made to determine the remaining items of cost associated with in-transit inspection on behalf of the western railroads as a group.[12]

Essentially, the respondents rely on their general study embracing the 16 western railroads and on the two cost items only—car delay and added switching. They do contend that the other costs are sustained and, to that extent, the costs shown are understated.

The primary figure relied upon by the respondents to show the cost of providing in-transit inspection is $16.52 and this figure is based, as stated, only on the expense categories of car detention and switching for the western railroads. This is composed of $10.14 as cost of car detention and $6.38 for cost of switching. The proposed charges range from $13.36 to $14.33. None of the respondents' show-

12. One of the respondents (Union Pacific Railroad) after an analysis of 956 inspected grain cars at three of its stations, Denver, Colo., Omaha and Lincoln, Nebr., concluded that its clerical costs amounted to 84 cents per car and that there were additional costs of 18.4 cents per car-mile for the backhaul required to move some cars to the inspection point. The total cost per car including a cost of $3.51 per day for each day the car was detained and $8.58 per switch ranged from $34.36 to $75.89. The study was based on data accumulated in 1968. One of the eastern railroad respondents also submitted a study which showed added clerical costs of 92 cents per car for the in-transit inspections.

ing as to detention time, switching minutes, or other costs makes reference to in-transit inspections in southern territory. The number of inspections in that territory are small and it is respondents' position that where they occur the same elements of car delay, car expense, and switching expense are involved.

The eastern railroad respondents have a currently effective charge for in-transit inspection of grain. It will be increased under the proposed schedules. These respondents undertook to develop the minimum costs incurred for holding cars for inspection, and their studies are discussed later in detail. Essentially, these costs include detention of cars, additional switching, and clerical expenses. The detention study in the East was confined to the three railroads on which the great majority of grain inspections are performed, Penn Central, C&O-B&O, and Norfolk and Western. The results indicate that the weighted average delay time due to grain inspection amounted to 44.91 hours per inspected car, which produces per car expense of $5.16. The switching studies encompassed 141 cars with an average switching time for inspection of 10.3 minutes per car more than is required on noninspected cars. At a cost of $0.76206 per switch engine minute, this produces a cost of $7.85 per car. The clerical cost based on ten observations at three inspection points (East St. Louis, Ill., Indianapolis, Ind., and Toledo, Ohio) show a cost of $0.82 per bill. The total of the three elements of expense amounts to $13.93 per car. On the basis of a 4 percent return on investment [illegible] Federal income taxes. On the basis of a 6-percent [illegible] the total expense is shown to be $15.96 [illegible] charge is $14.33.

[illegible] were made by individual respondents in [illegible] detention and additional switching [illegible] those shown in the study for the 16

western railroads. Respondents submit the individual studies for corroboration of their primary study. The results of such studies are shown in the tables set forth earlier, and the studies are described later in this report.

The respondents urge that the proposed charges, if they become effective, will not contravene the Commission's orders in the Docket No. 17000, Part 7, proceedings. The latter proceeding fixed the maximum rates for the movement of grain and grain products to, from, and within the West and there has been no vacation of that aspect of our outstanding orders. Respondents direct attention to the fact that the proposed charges will not apply to in-transit inspections where the underlying line-haul rates are at the Docket No. 17000, Part 7, level as increased by subsequently authorized general increases. It is their view that the currently effective rates on the vast majority of grain movements even when combined with the inspection charge proposed in the suspended tariffs do not exceed the Docket No. 17000, Part 7, level. Where they do, the proposed charge will not apply. Consequently, they submit that no violation of the outstanding orders can occur.

Anticipating that the protestants will make reference to a recent decision of the Commission, division 2, wherein proposed new transit charges (no separate charges were in effect for transit service), were found not shown to be just and reasonable, *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), the respondents urge that that decision is not applicable to the facts herein. There it was concluded, *inter alia*, that the railroads failed to show that their existing line-haul rates were not already sufficient to cover the service. Respondents urge that here they have demonstrated that the proposed charges are just and reasonable compared to the cost of providing the inspection

service, and that in the western district, the proposed charges, when combined with the existing line-haul rates, are less than the maximum prescribed rates on the same commodity. In the cited proceeding, it was also concluded that the proposed transit charges would likely divert traffic away from the railroads and thereby impair the railroads' net revenues. Such a determination is not possible on the evidence here, according to respondents. It is their view that competition with other modes for grain traffic will not be affected by the proposed charges.

Finally, the railroads refer to two issues raised during the hearing. The first is directed to a showing by the protestants that the proposed charges will result in violations of section 4 of the act. The respondents submit that any such violations are unintentional and will be corrected by appropriate tariff amendments when they become known. The second also relates to allegedly inadvertent changes in rates which one protestant submits results in unlawful preference. Respondents urge that there is no showing of any undue preference or prejudice of any location or shipper as to any traffic.

The supporting intervener, The Long Island Rail Road Company, advocates the same propositions advanced by the respondents. This party is particularly concerned with the practice of in-transit inspection in its relation to freight car supply. It suggests that the elimination of the car days for this inspection service would contribute more to the alleviation of the freight car shortage than the imposition of higher *per diem* charges on the terminating carrier. The intervener urges that the proposed charges are justified principally because of the benefits that will result in freight car supply and utilization.

Protestants.—Some 15 separate briefs were submitted by the protestants. Each of these parties request that the con-

sidered charges for in-transit inspection be found not shown to be just and reasonable. Their arguments, and evidence in support, is grouped into the following categories: (1) grain must be inspected and the only practical way for it to take place is while the shipment is in transit on the railroad, (2) the cost of the considered service is included in the line-haul rates and the proposed charge represents a surcharge not shown to be reasonable or justified, (3) car detention on grain inspected cars, where it occurs, is due to inefficient operating practices of railroads, (4) elimination of the in-transit inspection will not materially contribute to car supply, (5) the detention and car studies offered by respondents are basically deficient, and (6) the proposed charges, if they become effective, will result in violations of section 4 of the act.

Extensive evidence is presented by the protestants, particularly from the grain exchanges and the boards of trade, purporting to show that despite the change in the Federal statute an official inspection is required for the orderly marketing of grain. They also presented evidence showing the substantial movement of the grain loaded cars to inspection points for sampling and grading before the grain can be placed in trade channels for sale and distribution. The purpose of such evidence is to show that there is no other way for the preponderance of country grain elevators to secure official grades on the grain since they do not have automatic grain samplers. The grain market representatives also stress the necessity for an official inspection while the grain is still on the lines of the railroad in order to permit reconsignment of the shipments. Destination and origin sampling and inspection are impractical, according to the protestants. The former because the consignee would have difficulty in disposing of a shipment that failed to meet the grain required by his needs, and the latter because the cost of an original sampler precludes its installation at the majority of the country elevators.

The Secretary of Agriculture and most of the other protestants argue that the respondents have failed to sustain their burden of establishing that the proposed "additional charge" they seek to impose is reasonable and lawful in relation to the cost of performing the through service. Since the railroads, particularly those in the West and South, are presently not assessing a charge in their line-haul rates for the first stop for inspection, the protestants allege that the carriers may not now segregate the inspection service and assign to it a separate charge without first considering the entire through service of which the inspection is part and the compensation now being received for such service. The Secretary indicates on brief that he does not oppose the concept of a separately stated charge for the first stop for inspection but insists that the Commission must consider the revenue derived from the line-haul rates before it can determine the level of such a separate charge. A similar position is advocated by protestant National Grain and Feed Association. The latter submits that respondents have not sustained their burden of showing that proposed charges, applied in conjunction with the line-haul rates that permit the inspection, are just and reasonable. In support thereof, reliance is placed on *Transit Charges, Southern Territory, supra,* hereinafter more particularly considered.

There is also considerable evidence by protestants directed to the proposition that the car detention resulting from the in-transit inspection is due to respondents' inefficient operations. The presentation of the Fort Worth Grain Exchange, Fort Worth, Tex., and Far-Mar-Co., Inc., a company engaged in the handling, storage, and merchandising of grain with facilities in Colorado, Kansas, Nebraska, and Missouri, is representative of the showing in this area. The Fort Worth Exchange maintains that the Fort Worth yard of the Rock Island, one of the railroad yards in respondents' study, has antiquated facilities and an analysis of the serv-

ice rendered shows that too many cars designated for inspection are held in this yard. The delays for inspection are allegedly attributable to the inability of this respondent to perform the service. Similarly, Far-Mar-Co., Inc., contends that one of the respondents serving the inspection point of Hutchinson, Kans., regularly delays the movement of its cars following inspection until the second day after receipt of billing instructions. Almost without exception, the protestants urge that since the grain trade will continue to require the in-transit inspection there is little hope for enlarging the car supply under the proposed charges. If these charges become effective, the result will be an increase in respondents' revenue and the inspection delays that hinder a more efficient use of railroad cars will continue according to the protestants.

These parties also assail the various studies submitted by the railroads. Led by the Board of Trade of the City of Chicago and beginning with the profitability analyses, they uniformly challenge the reliability of all the studies presented. The use of the waybill statistics to measure the decrease in profitability for the grain movement is attacked because of the changes in the transportation of grain by railroad since 1966. The increased use of the heavier loading covered hopper cars, multiple-car movements, and unit trains in the past 4 years assertedly makes respondents' comparisons invalid. However, the principal opposition is directed to the car detention and switching studies.

Protestants contend that the basic premise of the detention study, namely, that any significant differences between the detention time for inspected cars and the control group of uninspected cars at any given station could be properly attributed to the service of inspection, is not established. Initially, as indicated, the respondents treated the inspected group of cars and the control group as if they were directly comparable and equal in all respects except for differences

that may be attributable to inspection. There was criticism during the hearing by protestants as to whether the inspected cars and uninspected cars differ importantly in the proportions in which they fall into different types of movement such as terminating, through, and transfer cars. Any difference could seriously bias the study. As indicated earlier, an adjustment was made to take care of this problem (the so-called like-vs.-like correction). Protestants do not accept the adjustment. They urge that for each of the 18 study stations there are five types of movements where inspected and uninspected cars would potentially be compared on a like-with-like basis or a total of 90 potential comparisons. Appendix B to the report shows protestants' computation of numbers of cars, inspected and uninspected, in the five types of movement for the 18 study stations. Of these 90 situations in which comparisons could be made, there are assertedly only 27 instances in which both inspected and uninspected cars occur and, even there, protestants submit that there are numerous instances where the number of inspected or uninspected cars is so small that no meaningful conclusion could be drawn from the happenstance of the detention time on such a small number of cars. On a total of 3,387 cars in the study, protestants contend that only 1,000 have a like-with-like comparison.

The second asserted basic error in the carriers' detention study to which protestants refer is that it was designed to include a large portion of time which they submit is not attributable to in-transit inspection. It is their view that the preponderance of the inspected cars in the study were at the particular study stations because they were to be delivered to industries at that point. The study, by definition, included the time the car spent at the study stations until it departed in a switch run to the industry which included all the time the cars spent on constructive placement because the industries were unable to receive additional

cars. Protestants submit that the constructive placement time should not be included in the time charged to inspection since the industry could not receive the cars regardless of whether they have been inspected or not.

Other deficiencies in the detention study are charged by protestant. These include the use of estimates at certain of the stations for delivery of uninspected cars; the elimination from the study of certain uninspected cars which were not representative and produced unduly long detention times; the failure to offset the detention time with the time the car would be held for sampling at origin; and the method of expanding the sample after the data was developed. Protestants did not attempt to restate the results because it is their view that the described defects cannot be cured by a restatement and they ask us to conclude that the extensive study has failed to produce a reliable and accurate estimate of the detention time.

Much criticism is also offered of the switching study submitted by the 16 western railroad respondents. There are allegedly three principal deficiencies in the 11-station study which make it unacceptable: (1) the 1-week period used is not a representative period, (2) the study assigned switching time to gain cars for inspection that should not be attributed to such cars, and (3) the assignment of too much nonproduction time to the inspected cars. Here, as in the detention study, protestants assert that the switching data submitted was so basically deficient it was impossible to make corrective adjustments and restate the switching costs. The other studies offered by the individual western railroads and by the eastern railroads were considered similarly deficient by protestants.

Finally, protestants argue that the assessment of the proposed charges will result in violations of the act. Primarily, reliance is placed on violations with respect to the provi-

sions of section 4 but there are also allegations that the additional charges, if they become effective, will produce unlawful preference and prejudice. As stated, the respondents do not propose to make the charges applicable where the line-haul rates for the movement of the grain when coupled with the said charge result in transportation charges that exceed the Docket No. 17000, Part 7, maximum rates as increased. This method of publication has resulted in departures from the long- and short-haul provisions of the section. While the respondents have indicated a willingness to correct all the violations brought to their attention, the protestants submit that there are numerous instances of section 4 violations and it is the obligation of the railroads to propose rates and charges which do not result in violations of the act.

Some of the protestants urge that the rate differences resulting from the elimination of the assessment of the charge where the applicable line-haul rates are at the Docket No. 17000, Part 7, level also cause unlawful preference and prejudice. The Public Service Commission, State of North Dakota, contends that the assessment of the charge for inspection on shipments of grain originating in North Dakota, which was approved in *Grand Forks Cham. of Com. v. Great Northern Ry. Co.*, 321 I.C.C. 356, results in undue prejudice to the North Dakota grain shippers and undue preference of other shippers of grain not paying the charge. This party asks the Commission to make the charge uniform throughout the western district. If the proposed charges are found not to be just and reasonable, we are asked to conclude herein that the charges applied in North Dakota are unduly prejudicial.

Discussion and Conclusions

This proceeding presents complex factual and legal issues and there is intense controversy. The issue of the lawful-

ness of any part of the unique pricing system applicable to the railroad movement of grain is always a perplexing task. Here the problem is further complicated by the inclusion of the equally difficult question relating to the national shortage of railroad freight cars.

It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a separate charge for this service in the East. A substantial increase in those charges will result, however, if the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district. Except where indicated otherwise, the discussion relates to the proposed charges in connection with the railroad movement of grain in the West.

We consider, initially, the record in relation to the justness and reasonableness of the proposed charges, without regard to the impact of such charges on the availability of railroad freight cars. We have resolved two preliminary questions. First, the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality. Second, it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad.

While it is conceded by protestants that in-transit inspection is not mandatory, they submit that it is the only logical and practical way for the sampling and grading to take

place. Even if we accept that proposition, it does not constitute a sound basis for requiring the railroads to continue making the service available. The in-transit inspection is an accessorial service. There is no mandate either in the act or in the Commission's decisions that compel the railroads to continue to provide the inspection service without separate charge merely because such a service is a convenience to shippers or, stated otherwise, provides a logical s... practical way for buyers and sellers to be assured of the grade or quality of grain in a particular shipment.

The significant aspect is, of course, whether the establishment of an additional charge for a service that has been provided at the line-haul rates is just and reasonable under the circumstances shown on this record. Protestants submit that it is not since respondents have failed to establish that the combination of the line-haul rate and the proposed charge does not exceed a just and reasonable level for the total services provided. Such an omission is assertedly critical in view of our decision in *Transit Charges, Southern Territory, supra.* Particular reference is made to the following excerpt from that decision (332 I.C.C. at 683 and 684):

> • • • The reasonableness of the proposal cannot be properly determined here without reference to, and consideration of, the line-haul rates, the services furnished thereunder, and the cost thereof. Clearly, in the circumstances presented, the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. Cf. *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943); *Unloading Lumber at New York Harbor,* 256 I.C.C. 463 (1943); and see *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652 (1954). While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if

indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed. Respondents have not endeavored to base their action here on any facts bearing upon the revenue-cost relationship of the complete operation. Nor have they indicated the effect of the proposal either overall or with respect to the movement of the specific commodities involved.

The instant proceeding is distinguishable from the cited proceeding in two important respects. As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without "reference to the line-haul rates, the services furnished thereunder, and the cost thereof," effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court of the United States, for the Southern District of Ohio, western division, *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, ... F.Supp. ... (decided January 12, 1970), while sustaining the Commission on other grounds, indicated that the burden of proof required of the respondent railroads was erroneous.

However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here. That difference is that the line-haul rate applicable to any movement of grain within the West when

coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products, supra.* Nor are we influenced to reach a contrary conclusion by protestants reference to the fact that the rate level was fixed more than 30 years ago and conditions and circumstances relating to the railroad transportation of grain have changed in the interim. There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products,* 298 I.C.C. 261 (1956), the Commission, while vacating prior orders in Docket No. 17000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.,* 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities.

One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra,* was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Similar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added. Grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available.

Even though the combined line-haul rate and proposed charge does not exceed the prescribed maximum level, it is still encumbent on the Commission to determine if the separate charge is reasonable when related to the specific service for which it is to be assessed. As indicated, extensive studies are offered to support the claim that it is.

The detention studies.—The key evidence with respect to an ascertainment of the cost factor associated with in-transit inspection and, as later considered, in connection with efficient car utilization, is the analyses of the time required to perform the indicated service. The principal study is the joint one presented by the 16 western railroads. The purpose of this study is to determine how much delay time is caused by the in-transit inspection on the railroad's track. The question can be answered satisfactorily by one of two standard methods; one requires a judgment of the inspected car movements, and the other requires the use of control groups. Both the judgment basis and control group may be used with probability sampling.

To eliminate judgments about detailed traffic elements and because of administrative problems in obtaining the

required data, the respondent carriers did not use the judgment basis. They used the control group for measuring the indicated delay. Control groups have been extensively used in medicine, industry and Government to determine cause and effect relationships. The two main requirements for an acceptable study are the use of adequate sampling methods and the use of a control group which adequately reflects likeness for those characteristics which may significantly affect the results.

The probability sample of stations for the 1968 car detention study is adequate for the selection of stations. There were 217 inspection stations in the frame covering the 16 western railroads. These 217 stations were stratified into 9 groupings or strata based upon estimated delay time for each of the 217 stations. A simple random sample of two was drawn from each stratum to yield a total of 18 stations. From each selected station a random sample of approximately 100 cars was selected from each of the two categories of inspected and uninspected cars for the year 1968. A total of 3,387 cars were randomly selected for study from which 12 had no data on handling time. Thus, each of the 217 stations had a known chance of being selected as well as each of the cars at the selected stations. This method of selecting study stations is called "stratified random cluster sampling." There was some shifting of some of the frame stations from the original stratified groupings, but this procedure is acceptable and does not invalidate the study since the random selection was done subsequent to this shifting. The delay times for each of the 18 stations were properly weighted and combined appropriately for the method of sampling used. The estimate for delay time developed from this study was 89 hours.

However, after the criticism by protestants described earlier, as to whether the inspected and uninspected cars differ in the proportions in which they fall into different

types of movement, adjustments were made to the data which resulted in a reduction to 73 hours of car delay. Basically the correction or adjustment formula (like versus like) takes care of the protestants' objection. This adjustment to the respondents data is equivalent to the use of the following formula. Under the formula the average delay time for a station equals the sum of the following four items:

FORMULA FOR DEVELOPING AVERAGE DELAY TIME DUE TO IN-TRANSIT GRAIN INSPECTION[13]

Average delay time for a station equals the sum of 1, 2, 3, and 4:

1. Average handling time for inspected cars.

2. Minus (proportion of inspected cars delivered at station) multiplied by (average handling time for uninspected cars delivered at station).

3. Minus (the allocated[14] proportion of inspected cars moving on through train) multiplied by (average handling time for uninspected cars moving on through train without set out).

4. Minus (the allocated[15] proportion of inspected cars moving on through train) multiplied by (average handling time for uninspected cars moving on through train with set out).[16]

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13. When cars are referred to this will always mean grain cars. Proportion refers to a percentage or ratio of cars in one category to another category.

14. This allocation based on the application of the ratio of uninspected cars in through trains without set outs to uninspected cars in all through trains.

15. This allocation based on the application of the ratio of uninspected cars in through trains with set outs to uninspected cars in all through trains.

16. Set out refers only to the setting out of a grain car by a train.

After the average delay time is computed for each of the 18 stations, they are weighted and combined to obtain average delay time due to inspection.

The purpose of this formula is to obtain comparisons between like movements for inspected and uninspected cars. This is done by the use of control groups obtaining like comparisons between pairs of groups of inspected and uninspected cars, made comparable by type of car, time, station, railroad, and type of movement. The types of movements used are grain cars terminating at the study station, grain cars in through movements but set out at the study station, and cars moving in through train movements without being set out.

To eliminate bias due to differing numbers of inspected and uninspected cars at a study station for each of these three types of movements, the formula does the following. Using only the sample data for the study stations and without use of subjective judgment, it automatically allocates the sample data following these basic precepts:

1. The *inspected* cars, if there were no in-transit grain inspection, would have the same proportions of deliveries and through moves that *inspected* cars now have at the study station.

2. The through cars being *inspected* would move on a through train without set out with as much likelihood as an uninspected car at the study station.

These two precepts or rules appear to be relatively realistic and appropriate for the actual situations at the study stations. Even if they may not conform exactly to the situation at a particular station, it seems reasonable that they should conform on the average to the situations at all the study stations combined.

For example, from the study at Fremont, there are 41 grain cars in a through movement that were set out for grain inspection but there were no like set outs for uninspected grain cars. Also, there were 97 uninspected grain cars that moved through on a fast train without set outs. (It is theoretically impossible for an inspected car to move on fast train without set outs.) Therefore, it is reasonable to expect any uninspected cars in the future to move on a fast train through Fremont. There is also a possibility that if a grain car in a through movement were not inspected at Fremont, it would be short-hauled by passing Fremont to its final destination. But this additional delay time due to backhauling for in-transit grain inspection is not developed by the formula. (See appendix B.)

Even if the five types of movement, referred to by protestants, were used, the average delay time would not change significantly. This is shown in the table set forth in appendix C. The values shown in column 8 of the table indicate the differences between the respondents' figures for delay time and the delay time for the individual categories. These differences indicate no trend in either direction and show in many cases close agreement. Out of 27 comparisons there are 15 which are within 5 hours differences.

Thus, the respondents' formula appears to be a valid and appropriate basis for determining the delay time.

Protestants claim that constructive placement time should have been excluded from the study both for terminating inspected cars and terminating uninspected cars. To the extent that both groups of cars had equal amounts of constructive place time included in their total handling times, constructive placement time is eliminated from the results. On this record it is not possible to state whether inspected cars have more constructive placement time than the uninspected cars. Knowledge about the constructive placement time would be pertinent, but it is not necessary

for the establishment of the validity of the car detention study. Five of the study stations (Clinton, Fremont, Lewiston, Little Rock, and Superior) had zero number of uninspected cars terminating there. Coordinators for the grain inspection made estimates of handling time of uninspected cars terminating at these stations. Protestants claim that these estimates were substantially in error. It is their view that 79 hours should be used instead of the coordinator's average estimate of 26 or 27 hours. The 79 hour figure is based upon an unweighted average of the uninspected cars' delay time at the other stations' terminating cars on the railroad's line. This figure, 79 hours, should not be substituted for the estimates of the coordinators. Protestants' estimate is heavily based on the experience of export grain at Seattle. The cars terminating at these five stations do not contain grain for export. The estimates of the coordinators are considered more acceptable.

However, it is apparent that the study coordinators excluded all constructive placement time from their estimates of handling time for uninspected cars terminated at Clinton, Fremont, Lewiston, Little Rock, and Superior. It is not determinable whether there was a significant amount of constructive placement for these stations. Allowing the total average handling time for these stations to be increased 50 percent would increase the overall like-vs.-like adjustment by less than 5 hours. A reduction in the average delay time from 78 hours would take care of this bias.

There are a number of other alleged deficiencies in the detention study which are referred to and considered in appendix D to the report. They are considered negligible in their impact on the accuracy and reliability of the study. Respondents' detention study is acceptable if estimated average car delay time is reduced to 73 hours from the original figure of 78 hours. The standard error for the delay time is about 8 hours. The study is a probability sample which basically follows the sampling guidelines used

in prior proceedings before the Commission. The respondents methodology of using control groups constitutes a statistically valid, credible, and appropriate method for estimating delay time.

There are, as indicated, other studies of record showing the detention time for the in-transit inspection. This service, at the line-haul rates, was eliminated in the East several years ago, so the issue now before us with respect to the eastern railroad respondents is whether the proposed charge is justified from a cost standpoint. These respondents undertook to develop the cost directly attributable to the holding of cars for grain inspection. The elements of expense primarily relied upon were the detention of the cars, the additional switching and the clerical expense. The great majority of grain inspections in the East are performed on the lines of the C&O-B&O, Norfolk and Western, and Penn Central; and the development of costs was confined to these lines.

These roads gathered sample data from yards providing grain inspection services by examination of all grain cars entering the yard on particular days. Different time periods were used, but all of the sample periods were designed to be of sufficient size to permit statistically valid analyses.

The difference in "yard throughput" (putting a car through the yard) between inspected and noninspected cars was determined on a conservative basis. The assignable time began with the entrance of a car into the yard on an inbound train and ended either with placement of the car on the consignee's siding, or placement on another train in the case of a nonterminal movement. On this basis, the weighted average difference in car throughput between inspected and noninspected cars amounts to 44.91 hours per car. The difference in car throughput varied from yard to yard and from railroad to railroad, but in every yard where statistical testing was possible there existed a strong statistical significance in the test for difference of means.

Every yard tested showed a positive mean difference between inspected car throughput and noninspected car throughput. This indicates both that the detention figures can be used with a high degree of confidence and that dollarization of such detention time is feasible. As shown in a table set forth earlier, the total detention cost to the eastern railroads for inspection amounted to $5.16.

Respondent Burlington Northern[17] conducted seven detention studies entirely separate from the 16-carrier 1968 study previously considered. Five were made at former Northern Pacific terminals and two at former Great Northern stations. The Northern Pacific detention study embraced the first 10 months of 1969. For 1,530 inspected cars in this study, the weighted average detention time per car was 102.4 hours. The weighted average detention time per car of 1,112 uninspected cars was only 34.4 hours. Inspected cars, thus, remained at the inspection points an average of 68 hours longer than uninspected cars. That is the detention time shown in the earlier table where the total inspection cost is computed at $7.45. The results at the Great Northern stations show an average detention time per car in a sample of 47 grain cars held at Spokane, Wash., for inspection during the period December 9-15, 1969, to be 109.1 hours while, on the cars not held for inspection during the study period, the average detention time was only 16.2, for a difference of 92.9 hours. At Great Falls, Mont., a similar study for the period June 25-July 1, 1969, shows that cars held for inspection remained an average of 92.3 hours longer than other cars not held for inspection and disposition orders. The car detention costs for this carrier are shown in the indicated table as $13.62 and $13.52, respectively.

It is unnecessary to consider the Burlington Northern studies in greater detail. They are offered by the western

17. The studies were instituted by the predecessor companies before merger.

railroad respondents as corrobative to the main or primary detention study of the 16 western railroads. We consider the 1968 study of the 16 western railroads as presenting reliable results with respect to car detention attributable to the in-transit inspection in the West.

The switching studies.—The basic study is the one offered on behalf of the 16 western railroad respondents. As earlier shown, the study was based on an analyses of the 11 stations and resulted in a final average switching time of 8.39 minutes per car. The switching study stations were chosen originally from the 18 stations used to determine the car detention time. However, because of problems associated with the 1-week study (for example, Fremont, Nebr., and Stockton, Calif., had no grain carloads during study week), a number of the stations were eliminated and others substituted. As a result, the sample of stations on the switching is, in part, based on a judgment selection. The comparative volume at the study stations is shown in the following table.

Selected stations and comparative volumes

Line No.	Railroad and study station (1)		1968 volume of cars (loaded and empty)		
			Year (2)	Average week (3)	Study week (4)
1	MILW	Aberdeen, S. Dak.	454,296	8,736	9,023
2	ATSF	Atchison, Kans.	14,033	270	336
3	CRIP	Belmond, Iowa[2]	2,919	56	197
4	SP	Colton, Calif.	[1]248,564	4,780	4,669
5	CNW	Huron, S. Dak.	92,477	1,778	1,306
6	IC	Iowa Falls, Iowa	[1]172,308	3,314	3,310
7	BN	Lincoln, Nebr.	[1]1,731,151	33,291	[3]37,236
8	UP	Omaha-Council Bluffs	463,655	8,916	[3]9,410
9	MP	St. Joseph, Mo.	155,516	2,991	2,075
10	UP	Spokane, Wash.	129,274	2,486	2,934
11	BN	Superior, Nebr.	9,314	179	[3]106

1. 1969 annual count of cars handled.
2. Study week was June 30-July 6, 1970.
3. Study week in April 1970.

The study period selected was 1 week in November of 1969, but three of the stations were studied during a week in April 1970, and one in July 1970 because of difficulties encountered in November of 1969. The stations studied were well distributed geographically and they constitute a fair representation of the stations originally in the frame of the 217 stations used in the detention study.

Protestants' criticism of the switching study was concerned chiefly with the adequacy of the sample of the traffic and the high nonproductive additive at a few of the stations studied. Corrections in the study as a result of the criticism decreased the average switching minutes from the 8.74 minutes in the original study. The use of 1 week for a study period has been accepted as appropriate in prior switching studies made by the railroads and conforms to procedures suggested by the Cost Section of the Commission's Bureau of Accounts. The average switching time of 8.39 minutes per car is acceptable as a measure of the time required to move the grain cars to and from the inspection tracks.

The eastern railroad respondents, having in mind the desirability of achieving a geographical spread with variation among points selected as to volume and effort required, presented switching studies at Toledo, Ohio, by the C&O-B&O, at Indianapolis, Ind., by Penn Central, and at East St. Louis, Ill., by the Norfolk and Western. The C&O-B&O study was conducted during the period November 4-6, 1969. B&O grain inspection at Toledo is performed at the Rossford yard, and, in a simple operation involving the switching of inspected cars to a classification track used for that purpose. The time required for the 69 cars moved to the inspected track during the study period averaged 7.4 minutes switching time per car, including an additive of 22.4 percent for nonproductive time. The operation at the Walbridge yard of the C&O at Toledo is more complicated.

Grain inspection at this yard must be performed on a separate track located across the main lines. During the study period the great majority of the traffic moved via Rossford yard and no attempt was made to compute the switching time for inspection at Walbridge.

Penn Central conducted a 3-day study at Indianapolis. Inbound carloads of grain for inspection at Indianapolis arrive either at Big 4 Yard, 11 miles west of Indianapolis, or at Hawthorne yard, in the southwest corner of Indianapolis. Inspections are made either at Hawthorne yard or at Hill yard, just south of Hawthorne yard. Carloads of grain for inspection arriving at Big 4 Yard for local delivery at Indianapolis are placed, along with other traffic, in a transfer cut to Hill yard which involves a movement of approximately 17 miles. Upon arrival at Hill yard, the cut is classified and the inspection cars are placed on a designated class track for further movement. After classification, noninspected cars are delivered directly to the elevator. The inspected cars must be moved from the class track to the inspection tracks, and then returned to the switching lead for a reclassification and further delivery. The only switching time charged at Hill yard for the inspected cars was for the movement from the classification tracks to the inspection track and return. Cars arriving at the Hawthorne yard are first classified. The grain cars to be inspected are moved to the inspection tracks, returned and reclassified for further delivery. The added switching time for the movement between the classification tracks and the inspection tracks at Hawthorne yard is attributable solely to placing cars for inspection, and this was the only switch engine time included in the study. The extra switching time required was 6.1 minutes per car at Hill yard, and 5.4 minutes per car at Hawthorne yard. In 1968, Indianapolis had about 1,500 inspections, or 5 percent of the Penn Central's

total. In 1969, Indianapolis had about 1,900 inspections, or about 10 percent of this carrier's total inspections.

The Norfolk and Western 3-day switching study at East St. Louis involved a more extensive movement than those at either Indianapolis or Toledo. At East St. Louis, the uninspected cars arrive at Middle Yard, receive one classification switch, and are then pulled for local delivery or for road train movement beyond. The cars to be inspected are first placed on a designated hold track at Middle yard for accumulation and subsequent transfer to Lower yard. The transfer movement to Lower yard involves the movement of the engine light to the Middle yard. In addition, switching service is required to effect placement on Lower yard inspection tracks, pulling from Lower yard track, and another transfer movement from Lower yard to Middle yard, the latter being normally preceded by the light movement of the transfer engine to Lower yard for this purpose. A further classification switch at Middle yard is then necessary. The extra classification switching at Middle yard came to 2.90 minutes per car, including nonproductive time. The movement from Middle to Lower yard averaged 5.35 minutes per car, and the return movement averaged 1.91 minutes per car, totaling 7.26 minutes. A conservative method of combining the trips in each direction produced 6.22 minutes per car and this figure was used. The total time for placing and pulling cars at Lower yard averaged 3.34 minutes per car. The addition of the nonproductive factor of 28.04 percent brought the average minutes per car inspected to 12.24, exclusive of the extra classification switching time at Middle yard. Adding this latter time of 2.90 minutes brought the total average time attributable to extra switching for grain inspection to 15.14 minutes per car. The annual volume of inspections on the Norfolk and Western at East St. Louis of 2,853 cars represents almost 10 percent of the carrier's total system inspections.

The three switching studies of the eastern railroads encompassed 141 cars, with an average switching time for inspection of 10.3 minutes per car over and above the time required on cars not held for inspection. At a unit-cost of $0.76206 per switch engine minute, this produced a cost of $7.85 per car.

Test observations at East St. Louis, Toledo and Indianapolis developed an average of 11.16 minutes of clerical effort per bill rendered. At the clerical wage rate in effect during 1969, this produces a cost of $0.92 per bill. With the inclusion of the car detention cost of $5.16, the total of the three elements of expense amounts to $13.93 per car on the basis of a 4-percent return on investments after Federal income taxes, and $15.96 per car on the basis of a 6-percent return on car value.

The switching studies by the Burlington Northern (Northern Pacific and Great Northern), like their car detention studies, are submitted to confirm the showing in the 16-carrier study. The studies by the former Northern Pacific were made at the three principal hold points at which the proposed charges would apply, Minneapolis and Duluth, Minn., and Spokane, Wash. Each study embraced 7 straight days of operations in December of 1969. The average chargeable switching minutes per car held for inspection were developed for each of the three study terminals. A weighted average of 4.906 switch engine minutes per car for every grain hold car embraced in the studies was developed. The average was weighted heavily for the experience at Spokane where grain cars held for inspection totaled 340 compared with 66 at Minneapolis and 34 at Duluth. Switching expenses were then determined by applying the 1968 out-of-pocket costs per switch engine minute to the 4.90 switching minutes per car charges to grain inspection, and the expenses were adjusted to the 1969 level. The former

Great Northern conducted its studies at the Spokane-Hill yard and at Great Falls. The only switching time counted was that which would not have been incurred if the grain cars counted (356 at Spokane-Hill yard and 51 at Great Falls) had not been held for inspection and disposition orders. Total additional switch engine time required to switch the grain hold cars at Spokane-Hill yard was 9.60 minutes and the total additional time at Great Falls was 12.65 switch engine minutes. To these minutes, the Great Northern applied 1969 costs based on normalized maintenance and system repair and depreciation rates for the class of locomotives operated at the study terminals in 1969 to the locomotive unit-miles operated by switch engines at these terminals in the same year. Calculations were also made for wage, switching fuel, lubricant, supplies, and enginehouse expenses directly chargeable to the study terminals in 1969 but no direct costs for supervision, general overheads or State taxes were factored. Nor was any return on investment in road property included in the switching costs.

In the table set out below, the incremental cost of switching, per grain inspection, on all study carriers is shown.

Line No. (1)	Study carriers (2)	Incremental cost of switching per grain inspection (3)
1	Western	$6.38
2	Eastern	7.85
3	NP	3.94
4	GN—Great Falls	8.30
5	GN—Spokane-Hill yard	6.42

An extensive discussion of the various aspects of the different car detention and switching studies has been considered essential because the proposed charges in the West represent an innovation that will have some effect on the

grain movement, at least in the immediate future. The opposition to these charges, particularly by the grain markets, is vigorous and we believe our careful scrutiny of the costs incurred by the railroads in rendering this in-transit service was necessary. This review has persuaded us that the 16 carrier studies represent a sound and valid appraisal of the expenses sustained and we are convinced by these analyses that, in the light of the services that are rendered, the proposed charges are just and reasonable. This is equally true for the eastern railroad respondents where the problems are less complicated since there has been a separate charge for this inspection service for several years, and the proposed charges represent increases. We believe that these increases have been shown to be justified based on costs. A comparison of the costs and charges is shown in appendix E. Adjustments were made to reflect the reduction in car detention time (3.04 days) considered more appropriate than the time (3.25 days) computed in the 16-carrier study. It should also be stressed that several elements of cost are not included in the computations, as indicated in the appendix table. In addition, the record here is persuasive that each carload of grain in the West receives approximately 1.5 in-transit uninspected services. Since all computations herein are predicated on a single inspection, the resulting costs are understated.

There is no significant opposition to the application of the proposed inspection charges in the South. The cost factors shown for both the western and eastern railroads are to a large degree shared by the southern railroads in performing in-transit inspection. Because of this general cost parity, the very limited use of the inspection service in the South, and the absence of opposition, our findings herein embrace the complete proposal under consideration.

Our conclusions are not invalidated by the fact that application of the proposed charges will on particular movements

of grain result in total charges that contravene the provisions of section 4 of the act. The respondents state that they attempted to avoid such violations in establishing the proposed charges, and any that still exist are due to lack of knowledge. The grain rate structure is complex and so-called fourth-section violations could result from the initial establishment of the inspection charges. During the suspension period the respondents were supplied with a number of potential violations. They advise that tariff amendments will be filed to clear every known departure from the fourth section, before the proposed charges become effective.

Allegations with respect to undue preference and prejudice raised by the North Dakota interests require little additional discussion. The establishment of the proposed charges will eliminate the discrimination, if any, resulting from the assessment of inspection charges at North Dakota points, and the failure to assess similar charges at other points in the West. Also, there is no convincing evidence to substantiate the protestants' allegation that rail inefficiency is responsible for increased car detention.

While we have concluded that the proposed charges are shown to be just and reasonable on the usual basis of review, it is encumbent to consider also the effect of such charges on the national shortage of railroad freight cars. It is not necessary to make specific findings that such a shortage, which at particular periods such as during the grain harvest is critical, actually exists. Shortages have been an annual occurrence for a number of years and there are numerous proceedings before the Commission which establish the fact. The shortage is also accepted as fact by the parties to this record who, as indicated, have argued at length the pros and cons of the effect of the proposed charges on car utilization and car supply.

Respondents state that the overriding consideration in the review of the proposed charges must be increased car utilization. This was the primary objective of the western railroads in proposing the inspection charge and is the apparent reason for the failure of a number of the larger grain and related industries to appear as protestants in this proceeding. The growth of the alternative sampling procedures indicates some progress away from the in-transit inspection. Because of the economic impact of the charges, the approval given herein should accelerate the use of the origin samplers. It is clear from the detention studies that the in-transit inspection results in an unwarranted loss of car availability, and the elimination of the service, or any significant portion of it, will materially increase car utilization. Respondents have introduced evidence showing that the car-days delay due to inspection in 1969 in the West alone amounted to more than 1.5 million. On the basis that a railroad freight car has 261 active car-days per year,[18] the respondents contend that their railroad freight car fleet is reduced by some 6,000 cars because of the delay due to grain inspection. The figures are computed on an average car detention per inspection of 3.25 days, and the total figure may be somewhat inflated. However, there is no question but what the elimination of the in-transit inspection would materially increase the number of available freight cars by several thousand annually.

Another matter not to be ignored is the loss of revenue caused by the reduced car supply due to grain inspections. Western railroads estimate this at more than $10 million annually. The figures supporting this estimate are set forth in appendix A.

Summary.—In the interest of a better understanding of

18. Derived from a publication of the Cost Section of the Commission's Bureau of Accounts.

this complex proceeding we restate, in summary, the chief subsidiary findings that lead us to the ultimate conclusion that the considered schedules are just and reasonable.

1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.

2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

Accordingly, we find that the proposed new or increased in-transit charges for inspection of grain at various points in the United States are just and reasonable and otherwise lawful.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission division 2.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A

TABLE 5.—*Respondents' showing of the revenue loss caused by reduced car supply due to grain car inspections*

Line No.	Item (1)	Total amount 1968 (2)	Total amount 1969 (3)
1	Count of inspections	464,164	488,601
2	Delay time (days)	3.25	3
3	Car days for the year	1,508,726	1,588,157
4	Active days per year	261	261
5	Car lost	5,781	6,085
6	Average trips per year	16.7	16.7
7	Lost car trips (miles)	96,543	101,620
8	Average revenue per car	$344	$344
9	Revenue loss	$33,210,792	$34,957,280
10	Reduction in out-of-pocket costs.	$22,289,122	$23,461,262
11	Loss in contribution to overhead.	$10,921,670	$11,496,018
12	One standard error would reduce 157,074 days from line 3.	.....	.....
13	Loss in contribution to overhead.	$9,784,286	$10,358,634

APPENDIX B

Counts of cars by type of movement

	TN		TS		IF		IR		DH		DI		No data		Total[1]	
	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected
Spokane	....	1	84	90	....	....	....	....	16	6	....	3	....	....	100	100
Chicago	....	....	....	....	9	45	....	....	9	5	64	34	1	2	82	84
Fremont	....	97	41	....	....	....	....	....	59	(–)	....	....	....	....	100	97
Alton	....	77	6	....	....	....	....	....	85	(3)	....	....	....	4	91	80
Atchison	....	79	....	....	....	....	....	....	....	....	100	17	....	....	100	96
Clinton	....	82	....	....	....	....	....	....	97	(–)	....	....	....	....	97	82
Belmond	....	109	9	....	....	....	....	....	....	....	82	1	....	....	91	110
Seattle	....	....	34	....	2	2	....	....	52	65	11	49	....	....	99	116
Wichita	....	87	29	2	....	....	....	....	....	1	64	11	....	....	93	101
Lewiston	....	....	95	100	....	....	....	....	....	....	4	(–)	....	....	99	100
Superior	....	....	13	....	72	100	....	....	13	(–)	....	....	....	....	98	100
Los Angeles	....	....	21	80	....	....	....	....	30	4	47	13	1	2	98	97
Aberdeen	....	17	96	83	....	....	....	....	....	....	....	....	....	....	96	100
Huron	....	....	89	112	....	....	....	....	....	....	....	....	....	....	89	112
Little Rock	....	11	9	83	5	....	....	....	47	(–)	23	(–)	....	2	84	94
Fort Worth	....	41	26	48	1	6	....	....	9	3	50	4	....	....	86	102
Houston	....	....	....	20	....	....	....	....	....	....	88	80	....	....	88	100
Stockton	....	20	....	2	2	60	....	....	....	....	22	19	....	....	24	101

[1] Eliminates no data cars.

TN—Through movement on reporting road, no set out.
TS—Through movement with a set out.
IF—Interline forwarded to connecting carrier.
IR—Interline received from connecting carrier.
DH—Delivered on line of reporting road.
DI—Delivered by interchange connection.

NOTE: Parentheses ( ) indicates cases where estimates of handling time were created by judgment rather than from the data collected.

Differences between two kinds of like-v.-like adjustments in the western car detention study

(all times are in hours)

Line No.	Station	Delay time after respondents' like-v.-like adjustments	Delay times for individual categories of cars[1]				Differences between respondents' delay time and the within-car-category delay times (column (3) minus column (4) or (5) or (6) or (7), as appropriate)
			TS	IF	DH	DI	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	Spokane	84	87	.....	51	.....	−3, +33
2	Chicago	63	.....	78	63	61	−15, 0, +2
3	Fremont	65	.....	.....	.....	.....	.....
4	Alton	54	.....	.....	.....	.....	.....
5	Atchison	76	.....	.....	.....	73	+3
6	Clinton	107	.....	.....	.....	.....	.....
7	Belmond	64	.....	.....	.....	61	+3
8	Seattle	114	.....	145	82	98	−31, +32, +16
9	Wichita	44	40	.....	.....	39	+4, +5
10	Lewiston	85	86	.....	.....	.....	−1
11	Superior	59	.....	53	.....	.....	+6
12	Los Angeles	84	92	.....	82	77	−8, +2, +7
13	Aberdeen	69	64	.....	.....	.....	+5
14	Huron	51	51	.....	.....	.....	0
15	Little Rock	42	68	.....	.....	.....	−26
16	Fort Worth	104	85	107	101	118	+19, −3, +3, −14
17	Houston	105	.....	.....	.....	105	0
18	Stockton	43	.....	98	.....	39	−55, +4

[1] TS—Through movement with an intertrain switch.
IF—Interline forward to connecting carrier.
DH—Delivered on the line of the reporting road.
DI—Delivered by interchange connection.

APPENDIX D

Alleged deficiencies in repondents' car detention study

1. Failure to include the time for the grain inspection at origin.

This criticism is not relevant to the purpose of the detention study which is to determine average car delay due to each in-transit inspection on the carrier's tracks. The study is limited to the direct delays at the inspection station based on comparison of inspected cars with a comparable group of uninspected cars.

2. The number of inspected or uninspected cars is so small that no meaningful conclusion could be drawn in numerous instances for the comparisons that are made.

Particular reference is made to Belmond where there are 82 inspected cars and 1 uninspected car in the DI category. However, differing subsample sizes for the sample stations for inspected and uninspected cars for the three categories used is accounted for in the standard error since all cars at each sampled station were randomly selected. (Also, the uninspected cars at Belmond were drawn at 100-percent rate for the study.)

3. There may be more weekend handling time for inspected cars as compared to uninspected cars, and the study should exclude the detention time for Saturdays and Sundays.

It is not clear whether there is more handling time on weekends for inspected cars than uninspected cars. Even if there were, it would not invalidate the study. A table is set out below showing the total number of inspected and uninspected cars in the sample summarized for day of the week. The ratio of inspected to uninspected cars in the last column indicates that there are proportionately less inspected cars arriving on the weekends than on the week-

days, 0.82 versus 0.91. It is apparent that there could be no upward bias in this case. Also, the delay time for weekends should be included because it is a proper part of the frame.

Total number of cars by day of week[1]

Day of week	Number inspected	Number uninspected	Ratio of inspected to uninspected cars
Grand total	1,549	1,750	0.89
Weekend total	437	530	0.82
Weekday total	1,112	1,220	0.91
Saturday	284	343	0.82
Sunday	153	187	0.81
Monday	203	194	1.05
Tuesday	262	236	1.11
Wednesday	178	233	0.76
Thursday	235	256	0.92
Friday	234	301	0.77

1. Excludes counts of cars for holidays.

4. Handling of the flagrantly unrepresentative results at Alton.

Respondents were criticized for discarding from the sample, three uninspected cars which terminated at Alton and using instead an estimate of 1 hour. The carriers contend that the delay time of minus 32 hours reported for Alton was unrepresentative. Respondents developed the average handling time of uninspected cars at Alton of 54 hours after determining that the high handling time of three uninspected cars was the cause of negative delay time. The substitution of 54 hours appears reasonable and proper. It was developed on the basis of using 1 hour for the switching time and 53 hours for the constructive placement time. If a flagrantly outlandish result for a subgroup turns up which significantly distorts the summary results there are statistical grounds for discarding that result.

5. Failure to discard uninspected cars which produced long detention time.

The statistical rule is that all handling time of every study car inspected or uninspected be included. The one exception is the situation for Alton. The figures for some of the long delayed cars in the sample which happen to be inspected cars have been established as correct by the respondents. They properly belong in the study. The frequency table below shows that Alton alone represents a group average which is outlandish. The minus 32 hours is the only figure that can be deemed as being flagrantly unrepresentative.

Frequency distribution of delay times for stations caused by inspection

Average delay time	Number
Total	27
0 - 24	0
25 - 49	3
50 - 74	9
75 - 99	10
100 - 124	4
125 - 149	1
Range of averages: 39 to 145 hours.	

6. The sample did not represent situations correctly at certain locations.

The answer is that the car detention study was not meant to obtain valid estimates for any particular subgroups. It was designed to obtain an overall estimate for delay time for the entire station and time frame.

APPENDIX E

Comparative showing of the costs and rates for handling freight cars for the purpose of in-transit grain inspection in the western district (year 1968), (dollars per car).

Line No.	(1)	Respondents: High range costs (2)	Respondents: Low range costs (3)	Protestants' costs (4)	Restated costs (5)
1	Car detention costs....	$10.14	$7.28	$7.31	[1]$6.81
2	Switching costs[2]	6.38	6.38	....	6.38
3	Added clerical costs[3] ..	.84	.84	....	.84
4	Cost of backhaul[4]	1.03	1.03	....	1.03
5	Cost of extra switching	NA	NA	....	NA
6	Loss and damage costs.	NA	NA	....	NA
7	Total costs	18.39	15.53	[5]7.31	[6]15.06
	Proposed charges:		Eastern district costs		
A	Eastern and southern territory	$14.33—($5.16 car detention + $7.85 switching costs + $0.92 clerical = $13.93 at 4-percent return)			
B	Western territory (east of Missouri River) ..	13.78			
C	Western territory (west of Missouri River) ..	13.36			

1. Based on corrected data of 3.04 car days additional detention for inspected grain cars—$2.24 per day costs. (Rail Form A at 4 percent return.)
2. Based on corrected data of 8.39 miutes per inspected car at $0.76070 per minute.
3. Based on lower range costs from exhibits of record.
4. Lowest backhaul cost from exhibits of record.
5. Protestants did not show costs other than detention of car costs.
6. This cost does not include loss and damage costs, added switching or additional transits for second inspection en route.

APPENDIX C

Served September 29, 1971

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided September 21, 1971

1. On reconsideration, proposed new or increased charges for in-transit inspection of grain at various points in the United States found just and reasonable and otherwise lawful. Prior report 339 I.C.C. 364.
2. Jurisdiction retained to receive and review reports required to be filed by respondents.

Appearances shown in the prior report and in addition: *Carl F. Schwensen, Fred B. Adam,* and *D. J. Russell* for protestants and *Mel Thompson* for the Honorable Keith G. Sebelius, United States House of Representatives, for First District, Kansas.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report, 339 I.C.C. 364, decided April 16, 1971, division 2 found that proposed new or increased charges for in-transit inspection of grain at various points in the United States were just and reasonable and otherwise lawful and entered its order discontinuing the proceeding. We had earlier determined that the proceeding presented an issue

of general transportation importance which action sanctioned, under section 1.101 of the General Rules of Practice, the filing of petitions for our reconsideration of the division's report and order. The schedules publishing the charges became effective on May 4, 1971, but pursuant to the indicated Rules of Practice many of the protestant parties to this proceeding filed petitions for reconsideration, some of which contained requests for oral argument. In response to the latter we heard the parties in oral argument on August 24, 1971, and subsequently, reopened the proceeding for reconsideration.

Initially, a procedural matter requires attention. On August 16, 1971, just prior to the oral argument, certain protestants filed a motion to strike portions of the respondents' reply to the petitions for reconsideration or, in the alternative, that we receive for consideration a number of documents attached to the motion. Respondents oppose both the motion and the alternative request in a reply filed September 7, 1971. The matter sought to be stricken and the addenda to the motion are concerned with conflicting analyses of the reaction of grain interests after the inspection charge became effective on May 4, 1971. The record as submitted supports our findings. The addition of self-serving unverified statements directed to events arising after the hearing was closed adds nothing of probative value. The motion of the protestants will be granted. The alternative request by protestants is thereby moot.

There will be no attempt to restate herein the scope of this extended and highly controverted proceeding. The complex factual and legal issues are described in detail in the earlier report and there is no serious challenge to the major portion of that recitation. Nor is there much fault to find with many of the preliminary findings of fact reached by the division. Accordingly, it should be stated at the outset that, following a careful review of the division's report and

order and an analysis of the record in the light of the arguments advanced orally by the parties, we adopt and affirm the findings and conclusions reached in the earlier report except to the extent modified subsequently herein. Such findings and conclusions are fully supported by the record and a restatement and review in this report would be repetitive and serve no purpose. Certain aspects of this proceeding appear to require some elaboration, or greater emphasis, and to a limited degree modification of the conclusions of division 2, and that is the reason for this brief report. In the interest of clarity, it will be necessary to set forth a brief description of the proceeding.

As noted by division 2, in-transit inspection relates to the practice of stopping railroad cars loaded with grain and grain products, including soybeans, and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the car. The inspection is the taking of a representative sample or samples to determine the official grade of the contents of the car for the purpose of establishing value of the commodity at the market. It does not include any inspection on tracks of the shipper at either origin or destination.

By far the predominant portion of the grain and grain product traffic that receives the in-transit inspection moves within the West. For many years the railroads that originate substantial quantities of this traffic have made provision for sampling and inspection while the loaded cars were in transit. The provision of the Federal statute which prior to 1968 required an inspection to establish the official grade could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been delivered to the consignee. The inspection in transit, as a practical matter, was more convenient for the grain trade and in *Grain and Grain Products,*

205 I.C.C. 301, 215 I.C.C. 83, the Commission approved the practice and provided for its continuance at the line-haul rates. There has been some erosion of the practice where the railroads have established reduced rates for particular movements of grain. However, the so-called docket No. 17000, Part 7 maximum rates (the basis prescribed in *Grain and Grain Products, supra*), and the currently effective rates for general application which are on a lower level than the prescribed basis, continued to provide for the in-transit inspection without charge in addition to the line-haul rates until the considered schedules became effective of May 4, 1971. On grain movements where the docket No. 17000, Part 7 bases of rates are applicable, the in-transit inspection charge does not apply. Nor does the charge apply where the line-haul rates plus the inspection charge equals or exceeds the maximum prescribed level.

The considered tariff schedules provide, as indicated, for new or increased charges by the rail carriers of this country for the first inspection of grain and grain products while in transit in railroad service. There has been a charge for this inspection service by the carriers on movements of the considered commodities within eastern territory[1] The scheduled increase that charge and they also publish a charge for the first time on the initial in-transit inspection stop on grain and grain products moving in railroad [illegible] within the western district[2] and within southern territory[3] As indicated earlier, and more particularly described in the prior report, there is only limited opposition to the increased proposed charge by the eastern respondents and none in

1. Territory generally east of the Illinois-Indiana State line and north of the Ohio River.

2. Territory west of the Great Lakes and on and west of the Mississippi River (including east bank points), Illinois and the Upper Peninsula of Michigan.

3. Generally the territory east of the Mississippi River and south of the Ohio River.

connection with the establishment of the charge for the inspection service for movements within the South. Practically all of the extensive opposition in the instant proceeding is directed to the publication of the charge for the first in-transit inspection charge within the West. As detailed in the prior report the charges range from $15.86 to $17.32 per car, and the division's conclusion that such charges are not excessive in amount is clearly warranted on the basis of the convincing evidence of record showing the costs sustained by the railroads in performing the in-transit inspection service. Protestants' assertions that the respondents' detention and cost studies of the in-transit inspection service are without probative value have little merit and need not be discussed herein. The division's findings and conclusions in this area are affirmed.

Our primary purpose in further considering the issues herein is to examine and evaluate two arguments stressed by protestants in their petitions and at the oral argument. The first is concerned with the receipt of evidence tendered by the respondent railroads, and received by the hearing examiner over the objection of the protestants, showing certain legislative history developed in connection with the enactment of the Grain Standards Act of 1968. Respondents offered this evidence to support their contention that freight car utilization was an important factor leading to the passage of the revised act which, as described in the prior report, eliminated the mandatory requirement for inspection of interstate movements of whole grains sold by grade and shipped to and from designated markets. The protestants submit that the revised statute is not ambiguous or unclear in any respect, and reference to the legislative history constituted prejudicial error. It is their view that railroad freight car utilization was not a factor of any consequence in the enactment of the revision of the Grain Standards Act and reference to certain testimony before

the appropriate committees of the Congress considering such revision created the false impression that the Congress modified the mandatory aspect of grain inspection to aid railroad car supply. The protestants also insist that such evidence unduly influenced division 2 and provided unjustified support for the railroads' position that the in-transit inspection charge is just and reasonable.

From a careful review of the division's analysis of the record and an examination of its findings, we are persuaded that the parties' assertions concerning the evidence directed to legislative history of the 1968 act are unfounded. Consideration of this legislative history in the prior report was merely as one factor supporting the ultimate conclusion of division 2 that the considered schedules were just and reasonable. This is evidence from the following finding, and ultimate conclusion set forth in the prior report;

> • • • Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute. However, it is equally clear that *improved car utilization in the movement of the whole grain by railroad was a consideration in the revision.* 339 I.C.C. at page 370. [Emphasis supplied.]

Summary.—• • •

> 1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and *increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with* evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain. 339 I.C.C. at page 401. [Emphasis supplied.]

The other area requiring additional comment, and a modi-

fication of rather an elaboration of the division's findings, relates to the revenue aspect of the inspection charge. Throughout the proceeding and particularly subsequent to the service of the division's report, protestants have urged that the inspection charge is directed essentially to the production of additional carrier revenue and they assail the validity of the railroads' contention that the basic reason for the imposition of the charge is increased car utilization. The division acknowledged the soundness of respondents' showing as to increased car utilization. We are convinced, as was the division, that the respondent railroads are more concerned with increasing utilization of its freight cars than they are in collecting the inspection charge. The record is clear that revenues to be derived from greater utilization of the cars substantially exceeds the amount otherwise obtained through imposition of the charges published in the considered schedules.

It is impossible to determine at this stage the amount of revenue that will be collected as a result of the inspection charge. We believe that such a determination is a relevant and material factor because of the conflicting forecasts of the effect of the imposition of such a charge. Accordingly, the respondent railroads, parties to the considered tariff schedules, will be required to maintain a record of the amount of money collected from the assessment of the charge beginning October 1, 1971, and to file a report with this Commission prior to June 30, 1972, setting forth the total collected by each respondent for the 6-month period subsequent to October 1, 1971. Similar reports will also be filed on or before December 31, 1972, for the 6-month period April 1, through September 30, 1972, and are to be continued for subsequent 6-month periods pending further order of the Commission.

We will retain jurisdiction of the instant proceeding to determine upon still further review whether we will require

that funds derived from the assessment of the considered charge, or any part thereof, be used to upgrade the fleets of freight cars operated by respondents.

Subject to the foregoing modification, we find that the report and order of division 2 in this proceeding, 339 I.C.C. 364, should be affirmed and that the petitions of protestants for findings inconsistent with those set forth in the indicated division report should be denied.

CHAIRMAN STAFFORD, concurring:

My chief concern is the extra burden this inspection charge could place on the grain producer. I am not fully persuaded that in transit inspection will be eliminated to any significant degree in the foreseeable future. However, I concur with the majority because of two overriding factors. The first is the belief formed by a review of the extensive record that the origin sampling and inspection of grain is the more effective procedure to follow, and the one most advantageous to the grain grower. The imposition of the in-transit charge will speed the increased use of this form of grain sampling. The second is directed to car utilization. My analysis leads me to the determination that there will be greater car availability as a result of the charge particularly during the critical car shortages that normally attend the grain harvest. These conclusions also quiet the doubts held concerning the legal aspects of the initial establishment of the charge in the West.

COMMISSIONER GRESHAM, dissenting:

I would find the present proposal not shown to be just and reasonable without prejudice to the resubmission of a proposal to separate the charge for in-transit inspection from the line-haul rate or charge and to reduce the line-haul rate or charge by a commensurate amount.

COMMISSIONER TUGGLE did not participate.

It is ordered, That the proposed new or increased charges for in-transit inspection of grain at various points in the United States are just and reasonable and otherwise lawful, and the findings in the prior report, 339 I.C.C. 364, be, and they are hereby, affirmed.

It is further ordered, That the respondents be, and they are hereby, required to submit reports showing the revenues derived from the collection of the said inspection charges in accordance with the schedule set forth in the report.

It is further ordered, That jurisdiction be, and it is hereby, retained by the Commission to further review the findings herein after receipt of the reports described in the preceding paragraph.

It is further ordered, That the motion of protestants filed August 16, 1971, to strike designated portions of respondents' reply to the protestants' petitions for reconsideration be, and it is hereby, grant-

And it is further ordered, That the petitions of protestants for findings inconsistent with those set forth in the prior report, 339 I.C.C. 364, as modified herein, be, and they are hereby denied.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX D

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE,
THE BOARD OF TRADE OF KANSAS CITY, MO.,
BOARD OF TRADE OF THE CITY OF CHICAGO,
OMAHA GRAIN EXCHANGE,
ST. JOSEPH GRAIN EXCHANGE,
ENID BOARD OF TRADE,
THE HUTCHINSON BOARD OF TRADE,
SIOUX CITY GRAIN EXCHANGE,
MERCHANTS' EXCHANGE OF ST. LOUIS,
THE DENVER GRAIN EXCHANGE ASSOCIATION,
LOS ANGELES GRAIN EXCHANGE,
FORT WORTH GRAIN EXCHANGE,
PEORIA BOARD OF TRADE,
UTAH-IDAHO GRAIN EXCHANGE,
STATE CORPORATION COMMISSION OF THE STATE OF KANSAS,
MISSOURI DEPARTMENT OF AGRICULTURE,
KANSAS GRAIN & FEED DEALERS ASSOCIATION,
NATIONAL GRAIN TRADE COUNCIL,
NATIONAL GRAIN AND FEED ASSOCIATION,
MISSOURI FARMERS ASSOCIATION, INC.,
CASH GRAIN ASSOCIATION OF THE CHICAGO BOARD OF TRADE,
PACIFIC NORTHWEST GRAIN DEALERS ASSOCIATION, INC.,
NATIONAL ASSOCIATION OF WHEAT GROWERS,
KANSAS CITY GRAIN COMMISSION MEN'S ASSOCIATION,
CALIFORNIA GRAIN AND FEED ASSOCIATION,
FAR-MAR-CO., INC.,
FS SERVICES, INC.,
PRODUCERS GRAIN CORPORATION,
BUNGE CORPORATION,
C-G-F GRAIN COMPANY, INC.,
GARVEY ELEVATORS, INC.,
GARVEY GRAIN, INC.,
LINCOLN GRAIN, INC.,
MIDWESTERN GRAIN COMPANY—DIVISION OF GARNAC GRAIN CO., INC.,
MASTERS GRAIN COMPANY,
HOLLANDER & FEUERHAKEN,
MOHR-HOLSTEIN COMMISSION CO.,
STOTLER & COMPANY,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,

Defendants.

CIVIL ACTION
No. W4730

THREE-JUDGE COURT

COMPLAINT

1. This is an action brought under the provisions of 28 U.S.C. §1336, 1398, 2284, and 2321-2325, and 5 U.S.C. §551

et seq., to enjoin, annul, set aside, and suspend orders of the Interstate Commerce Commission (hereinafter "the Commission"), made and entered by the Commission, Division 2, on April 16, 1971 (served April 21, 1971) and by the Commission (*en banc*, with Commissioner Gresham dissenting and Commissioner Tuggle not participating) on September 21, 1971 (served September 29, 1971), in proceedings entitled Investigation and Suspension Docket No. 8548, *Inspection in Transit, Grain and Grain Products*, reported at 339 I.C.C. 364 and 340 I.C.C. 69, respectively, copies of which reports and orders are attached hereto as appendixes A and B. By such reports and orders the Commission found that new railroad charges for inspection of grain in transit in the Western District of the United States, collectable in addition to the line-haul rates for transporting grain, are just and reasonable and otherwise lawful.

2. Venue is in this Court by reason of the fact that The Wichita Board of Trade and numerous other plaintiffs have their principal offices in this judicial district.

3. Plaintiffs The Wichita Board of Trade, Board of Trade of Kansas City, Mo., Enid Board of Trade, Omaha Grain Exchange, St. Joseph Grain Exchange, Board of Trade of the City of Chicago, Merchants' Exchange of St. Louis, Sioux City Grain Exchange, The Hutchinson Board of Trade, Forth Worth Grain Exchange, and Los Angeles Grain Exchange were protestants before the Commission against the proposed new charges. Their members include hundreds of grain companies, country grain elevators, terminal grain elevators, brokers and other companies and individuals actively engaged in the grain trade, throughout the Western District of the United States.

4. The Denver Grain Exchange, Utah-Idaho Grain Exchange, and Peoria Board of Trade operate exchanges

where grain is bought and sold daily. Although not parties to the Commission proceeding, they and their members are directly and adversely affected by the Commission's orders here involved.

5. FAR-MAR-CO., INC., a Kansas corporation, is a cooperative engaged in handling, storing and merchandising grain for the account of producers located in the states of Kansas, Iowa, Nebraska, Wyoming, Colorado and Missouri. Its members operate a total of 694 elevators. It appeared as a protestant in the Commission proceedings.

6. FS Services, Inc., as here pertinent, includes as an agricultural cooperative producers of grain throughout the state of Illinois as well as grain elevators engaged in the purchase and marketing of grain. It appeared as a protestant in the Commission proceedings.

7. Producers Grain Corporation is a regional cooperative association with its general office in Amarillo, Texas. It is owned by its member associations which are owned by farmers. The farmer members and stockholders exceed 40,000 farm families. The member cooperative associations located in the states of Colorado, Kansas, Oklahoma, New Mexico and Texas, operate in excess of 100 facilities for receiving and shipping grain. It appeared as a protestant in the Commission proceedings.

8. Midwestern Grain Company, a division of Garnac Grain Co., Inc., Bunge Corporation, C-G-F Grain Company, Inc., Garvey Elevators, Inc., Garvey Grain, Inc., Lincoln Grain, Inc., Far-Mar-Co., Inc., Mohr-Holstein Commission Co., Stotler & Company, Hollander & Feuerhaken and Masters Grain Company are grain merchants or elevator operators or both. They appeared as individual protestants in the Commission proceeding or were represented by the various boards of trade or other associations of which they

are members and their interests are directly and adversely affected by the Commission orders here involved.

9. National Grain Trade Council, National Grain and Feed Association, Missouri Farmers Association, Inc., Kansas Grain & Feed Dealers Association, California Grain and Feed Association, Cash Grain Association of the Chicago Board of Trade, Pacific Northwest Grain Dealers Association, Inc., National Association of Wheat Growers, and Kansas City Grain Commission Men's Association are trade associations representing producers, grain merchants, and other segments of the grain and grain products industries whose interests are directly and adversely affected by the Commission's orders here involved. Several of these associations were protestants and/or submitted evidence in the Commission proceeding.

10. The State Corporation Commission of the State of Kansas is an agency of the State of Kansas and the Missouri Department of Agriculture is an executive department of the State of Missouri. Both appeared as protestants in the Commission proceeding for the purpose of representing and protecting grain producers, grain merchants, elevator operators and other segments of the grain and grain products industries of their respective states as well as the interests of consumers and the public interest generally.

11. By tariff schedules filed to become effective on March 28, 1970, the railroads operating throughout the Western District of the United States (generally, the area west of the Indiana-Illinois Line) proposed to establish new charges for the service of allowing carloads of grain to be inspected on railroad tracks, either in transit or at destination. The service of grain inspection itself is performed by state-licensed grain inspectors who take a sample of the contents of cars while on railroad tracks and make an official report which constitutes the basis upon which grain is bought, sold,

and traded throughout the Western District. Historically, the rail rates applicable on the transportation of grain throughout the West, with but few exceptions, have contemplated and included such service as a railroad provides in making the cars available to the grain inspectors in order to draw their samples. The railroads' proposal to add a separate charge for the inspection service evoked large scale opposition by grain trade interests throughout the western United States, primarily the parties plaintiff in this action. Also involved in the Commission proceedings were certain adjustments proposed by Eastern railroads in their charges in the Eastern portion of the United States. However, plaintiffs do not here assail those charges.

12. The Commission, pursuant to 49 U.S.C. §15(7), suspended the effectiveness of the new charges for the statutory seven month-period during which it held an investigation into their lawfulness. After the issuance of the order of Division 2, cited above, but before petitions for reconsideration by the entire Commission were due (because the Commission had served notice that the proceeding involved "an issue of general transportation importance"), the railroads elected to place the charges into effect. They became effective on May 4, 1971, and remain in effect while this judicial review action is pending.

13. Hearings in the Commission proceedings were held July 13 to July 22 and August 13 and 14, 1970, in Washington, D. C., and on July 27 through August 4, 1970, in Chicago, Illinois, before a Hearing Examiner. In view of the urgency of the case and the seven months limitation on the Commission's suspension power, the Commission properly waived an examiner's report and the initial decision was issued by Division 2 of the Commission on April 16, 1971 (Appendix A hereto). After petitions for reconsideration were duly filed by several of these plaintiffs and

others, the entire Commission, with one Commissioner dissenting and one Commissioner not participating, issued its report on September 21, 1971. The report and order of the entire Commission, attached hereto as Appendix B, "affirmed" that of Division 2, with only minor modifications, and similarly concluded that the new charges are "just and reasonable and otherwise lawful" (340 I.C.C. at 74). Accordingly, plaintiffs' administrative remedies were thereby exhausted and this matter is ripe for judicial review pursuant to the terms of section 17(9) of the Interstate Commerce Act, 49 U.S.C. §17(9).

14. The Commission's action, by finding the said new charges just and reasonable and otherwise lawful, allows the charges to continue in effect with Commission sanction and thereby requires these plaintiffs and the members of plaintiff organizations to pay these new charges for a service which was previously covered by the line-haul rates but without any concomitant reduction in the line-haul rates.

15. By its orders of April 16, 1971, and September 21, 1971, the Commission:

A. Arbitrarily and capriciously approved the imposition of new charges in addition to the line-haul rates which already covered such services and compensated the railroads therefor.

B. Arbitrarily, capriciously, without the support of adequate findings or substantial evidence, and contrary to the statutory provisions of the Interstate Commerce Act:

1) Found that the new charges proposed are just reasonable, and otherwise lawful.

2) Declined to make such other findings as would be required to conclude that the charges involved are not just and reasonable and otherwise lawful, thereby authorizing the imposition of these charges upon the shipping public.

3) Found that the addition of the new charges to the line-haul rates already covering inspection service would not exceed, *in toto*, a just and reasonable level solely because such total charges do not exceed certain grain rates prescribed many years ago in its Docket 17000, plus intervening general-revenue increases.

4) Found that the addition of the new charges to the existing line-haul rates would not result in diversion of grain traffic to trucks.

5) Failed to make any findings or even to consider whether the railroads fulfilled their statutory burden of showing a need for the increase in revenue on grain which would result from these new charges.

16. For the above reasons, and for further reasons, the orders of the Commission of April 16, 1971, and September 21, 1971, fail to include adequate findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law or discretion presented on the record, are issued in excess of statutory authority, are short of statutory right, are an abuse of discretion, are without substantial support in the evidence of record, are contrary to the evidence of record, violate plaintiffs' rights to due process of law, and are violative of the Interstate Commerce Act, 49 U.S.C. §1, *et seq.*, the Administrative Procedure Act, 5 U.S.C. §551 *et seq.*, and the National Transportation Policy, 49 U.S.C., preceding §1.

WHEREFORE, plaintiffs pray:

(a) That process issue against the defendants, United States of America and Interstate Commerce Commission;

(b) That, in accordance with the provisions of 28 U.S.C. §§1336, 1398, 2284, and 2321-2325, inclusive, a Court consisting of three judges, at least one of whom shall be a circuit judge, be convened to hear and determine this action;

(c) That the Court review the reports and orders of the Interstate Commerce Commission in this matter as provided in title 5 U.S.C. §§701-706;

(d) That, upon final hearing, the Court enter an order annulling, vacating, setting aside and permanently enjoining the aforesaid orders of the Commission dated April 16, 1971, and September 21, 1971, and remanding the proceeding to the Commission with instructions to find that the proponent carriers failed to meet their statutory burden of proof under 49 U.S.C. §15(7) and require cancellation of the involved charges;

(e) That the Court grant such other and further relief as may be meet.

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APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs,	
EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES, Applicant for Intervention	**CIVIL ACTION No. W-4730**
vs.	**THREE-JUDGE COURT**
THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants.	

COMPLAINT

I

Intervening plaintiff, Earl L. Butz, Secretary of Agriculture of the United States, hereinafter referred to as the Secretary, brings this complaint to suspend, enjoin, annul and set aside the orders of the Interstate Commerce Commission, hereinafter referred to as the Commission, made and entered by the Commission, Division 2, on April 16, 1971 (served April 21, 1971) and by the full Commission on September 2, 1971 (served September 29, 1971), in proceedings entitled Investigation and Suspension Docket No. 8548, *Inspection in Transit, Grain and Grain Products;* reported at 339 I.C.C. 364 and 340 I.C.C. 69, respectively.

II

The jurisdiction of this Court is invoked under and pursuant to the provisions of Title 28 U.S.C., sections 1336,

1398, 2284, and 2321 to 2325, inclusive, and Title 5 U.S.C., sections 701 to 706, inclusive.

III

The Secretary was a party to the proceedings before the Commission out of which the present action arises.

IV

The United States of America is named as a statutory defendant pursuant to the provisions of Title 28 U.S.C., section 2322.

V

The railroads operating throughout the Western District of the United States, by tariff schedules filed to become effective on March 28, 1970, proposed to establish new or increased charges for the first stop for in-transit inspection of grain and grain products at points in the United States. This action was protested by the Secretary and numerous other interested parties.

VI

The effective date of the proposed schedules was suspended by the Commission for a period of seven months, pursuant to section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), and an investigation into the lawfulness of the proposed charges was initiated.

VII

Hearings in the Commission proceeding were held July 13 to July 22, and August 13 and 14, 1970, in Washington, D.C., and on July 27 through August 4, 1970, in Chicago, Illinois. The Secretary participated in that proceeding.

VIII

By report and order served April 21, 1971, and reported at 339 I.C.C. 364, the Commission, by its Division 2, found

the proposed charges to be lawful. The Secretary duly filed a petition for reconsideration on May 21, 1971. Oral argument was held before the full Commission on August 24, 1971, and the report of the full Commission was issued on September 21, 1971 (340 I.C.C. 69). In that report the Commission affirmed the decision of its Division 2 with only minor modifications and concluded that the new charges are "just and reasonable and otherwise lawful" (340 I.C.C. at 74). Under the provisions of section 17(9) of the Interstate Commerce Act (49 U.S.C. 17(9)), and Rule 101(a)(3) of the Commission's General Rules of Practice (49 CFR 1100.101(a)(3)), the aforesaid orders of the Commission are administratively final.

IX

The new charges for in-transit inspection of grain became effective on May 4, 1971, and continue in effect at this time.

X

The Commission's orders of April 16 and September 21, 1971, contain findings and conclusions which are arbitrary, capricious, lacking a rational basis, and are otherwise not in accordance with the law. Specifically, and without limiting the generality of the foregoing, the Commission erred in the following respects:

A. The Commission approved the imposition of a new charge for a service for which compensation was already included in the line-haul rate.

B. The Commission found that the new charges are just, reasonable, and otherwise lawful because (1) the combination of the new charge and the existing line-haul rates did not exceed the maximum reasonable level for grain rates prescribed by the Commission over 35 years ago in its Docket 17000, *Grain and Grain Products*, 205 I.C.C. 301, 215 I.C.C. 83, and (2) the imposition of the addi-

tional charge would result in greater car utilization.

WHEREFORE, the Secretary, as intervening plaintiff, prays:

1. That this Court suspend, enjoin, annul and set aside the orders of the Commission complained of herein; and

2. That the Secretary be granted such other and further relief in the premises as justice may require and as may be deemed fit and proper by this Court.

Respectfully submitted by direction of Earl L. Butz, Secretary of Agriculture of the United States.

Charles W. Bucy
Assistant General Counsel

Kenneth H. Vail
Attorney
Office of the General Counsel
United States Department of Agriculture
Washington, D.C. 20250

[Certificate of Service Omitted in Printing]

APPENDIX F

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, and **EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,** Intervening Plaintiff, vs. **THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,** Defendants, and **THE ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY, ET AL.,** Intervening Defendants.	**CIVIL ACTION No. W-4730**

ANSWER OF THE INTERSTATE COMMERCE COMMISSION TO THE COMPLAINT OF INTERVENING PLAINTIFF EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES

Defendant Interstate Commerce Commission answers the allegations of the complaint of intervening plaintiff Earl L. Butz, Secretary of Agriculture of the United States, as follows:

I

Admits the allegations of paragraphs I through IX, inclusive, and respectfully refers the Court to the text of the

reports and orders of the Commission and other documents referred to therein for a complete and accurate statement of their contents.

II

Denies the allegations of paragraph X.

III

Except as expressly admitted herein, denies each and every allegation of the intervening plaintiff's complaint.

IV

In further answer to the intervening plaintiff's complaint, avers that its actions were lawful and proper in all respects.

WHEREFORE, defendant Interstate Commerce Commission prays that the complaint of intervening plaintiff Earl L. Butz, Secretary of Agriculture of the United States, be dismissed and all relief denied.

Respectfully submitted.

FRITZ R. KAHN
General Counsel

HANFORD O'HARA
Attorney
Interstate Commerce Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

[Certificate of Service Omitted in Printing]

APPENDIX G

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, vs. **THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION, Defendants,** and **THE ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY, ET AL., Intervenor-Defendants.**	**CIVIL ACTION No. W-4730 THREE-JUDGE COURT**

ANSWER OF THE INTERSTATE COMMERCE COMMISSION

Defendant Interstate Commerce Commission answers the allegations of the complaint as follows:

I

Admits the allegations of paragraph 1, and respectfully refers the Court to the text of the reports and orders of the Commission referred to therein (Appendices A and B to the complaint) for a complete and accurate statement of their contents.

II

Admits the allegations of paragraph 2.

III

With respect to the allegations of paragraph 3, admits that the plaintiffs named therein were protestants in the Commission proceeding, but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

IV

With respect to the allegations of paragraph 4, admits that the plaintiffs named therein were not parties to the Commission proceeding; is without knowledge or information sufficient upon which to form a belief as to the truth of the allegations contained in the first sentence of paragraph 4; and denies that these plaintiffs or their members are directly and adversely affected by the Commission's orders involved herein.

V

With respect to the allegations of paragraphs 5, 6, and 7, admits that FAR-MAR-CO., INC., FS Services, Inc., and Producers Grain Corporation were protestants in the Commission proceeding; but is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations.

VI

With respect to the allegations of paragraphs 8 and 9, admits that some of the plaintiffs named therein appeared as protestants in the Commission proceeding; denies that the plaintiffs named therein are directly and adversely affected by the Commission orders here involved; and is without information or knowledge sufficient to form a belief as to the truth of the remaining allegations.

VII

With respect to the allegations of paragraph 10, admits the allegations contained in the first sentence thereof and

that both plaintiffs referred to therein appeared as protestants in the Commission proceeding; but is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations.

VIII

With respect to the allegations of paragraph 11, admits those contained in the first, fifth and last sentences thereof; avers that the remaining allegations are argumentative and require no answer, and, to the extent that the remaining allegations may be deemed factual in nature, they are denied. In addition, respectfully refers the Court to the text of the two reports and orders of the Commission (Appendices A and B to the complaint) for a complete and accurate statement of the facts involved.

IX

Admits the allegations of paragraph 12, but avers that the placing of the charges in effect by the railroads was lawful and proper in all respects.

X

Admits the allegations of paragraph 13.

XI

With respect to the allegations of paragraph 14, admits that the Commission, by finding the charges to be just and reasonable and otherwise lawful, allows them to continue in effect with Commission sanction, but denies the remaining allegations, and avers that the Commission's orders here involved do not require plaintiffs or anyone else to pay the charges at issue since the service they cover is optional and may be obtained at origin or destination rather than in transit on carriers' tracks, or omitted altogether.

XII

Denies the allegations of paragraphs 15 and 16 (erroneously numbered 15).

XIII

With respect to the Prayer for Relief, avers that insofar as paragraph (d) thereof seeks to have this Court instruct the Commission to make certain findings and require certain action, such relief is beyond the power of this Court to grant. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94 (1966).

XIV

Except as expressly admitted herein, denies each and every allegation of the complaint.

XV

In further answer to the complaint, avers that its actions were lawful and proper in all respects.

WHEREFORE, defendant Interstate Commerce Commission prays that the complaint be dismissed and all relief denied.

Respectfully submitted,

FRITZ R. KAHN
General Counsel

HANFORD O'HARA
Attorney
Interstate Commerce Commission
Washington, DC 20423

Attorney for the Interstate Commerce Commission

[Certificate of Service Omitted in Printing]

APPENDIX H

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, vs. **THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,** Defendants, and **THE ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY, ET AL.,** Intervenor-Defendants.	**CIVIL ACTION No. W-4730 THREE-JUDGE COURT**

SEPARATE ANSWER OF INTERVENOR-DEFENDANTS THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., TO COMPLAINT OF THE WICHITA BOARD OF TRADE, ET AL.

Intervenor-defendants, The Atchison, Topeka and Santa Fe Railway Company, et al., in answer to the Complaint state:

1. Intervenor-defendants admit the allegations in paragraph 1 of the Complaint.

2. Intervenor-defendants admit the allegations in paragraph 2 of the Complaint.

3. Intervenor-defendants admit the allegations in paragraph 3 of the Complaint insofar as they state that the named plaintiffs were protestants before the Interstate Commerce Commission against the proposed new charges,

but are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 3, and therefore deny the same.

4. Intervenor-defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of paragraph 4 of the Complaint, admit that the named plaintiffs were not parties to the Commission proceeding, but deny that such plaintiffs and their members are directly and adversely affected by the Commission's orders here involved.

5. Intervenor-defendants admit the allegations of paragraph 5 of the Complaint insofar as they state that FAR-MAR-CO., INC., appeared as a protestant in the Commission proceeding, but otherwise are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 5 and therefore otherwise deny the same.

6. Intervenor-defendants admits the allegations in paragraph 6 of the Complaint.

7. Intervenor-defendants admit the allegations of paragraph 7 of the Complaint insofar as they state that Producers Grain Corporation appeared as a protestant in the Commission proceeding, but otherwise are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 7 and therefore otherwise deny the same.

8. Intervenor-defendants generally admit the allegations in paragraph 8 of the Complaint but deny that the named plaintiffs are directly and adversely affected by the Commission orders here involved.

9. Intervenor-defendants generally admit the allegations in paragraph 9 of the Complaint but deny that the interests of the named plaintiffs and the producers, grain merchants,

and other segments of the grain and grain products industries represented by such plaintiffs are directly and adversely affected by the Commission's orders here involved.

10. Intervenor-defendants admit the allegations in paragraph 10 of the Complaint insofar as they state that the named plaintiffs are executive departments of the State of Missouri and that they appeared as protestants in the Commission proceeding, but otherwise are without knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 10 and therefore otherwise deny the same.

11. Intervenor-defendants admit the allegations in the first, fifth and last sentences of paragraph 11 of the Complaint, but deny the remaining allegations in paragraph 11 and aver that the service of grain inspection is not essential to the orderly marketing of grain in the Western District; that such service is performed by state-licensed grain inspectors, by non-licensed elevator employees or is omitted altogether; that some grain marketed in the Western District is bought, sold and traded on the basis of an official inspection report, but that a large volume of grain marketed in the Western District is not bought, sold and traded on this basis; that there have historically been many exceptions to the former practice of including inspecton in the line-haul rail rates applicable on the transportation of grain throughout the West; and that the railroads' proposal to add a separate charge for the inspection service evoked opposition only by a narrow segment of the grain trade represented by the parties plaintiff in this action, was favored by many segments of the grain trade, and was unopposed by other segments of the grain trade, all as set forth in the Commission's reports and orders of April 16, 1971, and September 21, 1971.

12. Intervenor-defendants generally admit the allegations in paragraph 12 of the Complaint but aver that their action in placing the charges into effect after the issuance of the order of Division 2 and the expiration of the suspension period was lawful and proper pursuant to 49 U.S.C. § 15(7).

13. Intervenor-defendants admit the allegations in paragraph 13 of the Complaint.

14. Intervenor-defendants generally admit the allegations in paragraph 14 of the Complaint insofar as they state that the Commission's action, by finding the said new charges just and reasonable and otherwise lawful, allows the charges to continue in effect with Commission sanction, but otherwise deny the allegations in Paragraph 14 and aver that the Commission's action does not require plaintiffs, members of plaintiff organizations or anyone else to pay these new charges since the inspection service they cover is optional, may be obtained at origin or destination rather than in transit on carriers' tracks, or omitted altogether thereby enabling plaintiffs or anyone else to avoid payments of the charges, and is unnecessary to the orderly marketing of grain in the Western District.

15. Intervenor-defendants admit that the Commission made the findings it made in its reports and orders of April 16, 1971, and September 21, 1971, but otherwise deny each and every allegation in paragraph 15 of the Complaint and aver:

A. That the Commission properly approved the new inspection charges in view of the evidence contained in the record before the Commission that inspection in transit is not necessary to the orderly marketing of grain and that its elimination will eliminate substantial delay in the movement of grain carloads thereby materially increasing the effective railroad carfleet

available to move grain during periods of peak demand and alleviating the perennial freight car shortage during such period.

B. That the Commission properly found on the basis of the evidence of record before it that the new charges proposed are just, reasonable and otherwise lawful; made all findings required by the evidence of record before it; properly found, in view of its outstanding orders in its Docket 17000, Part 7, plus intervening general revenue increases, that the addition of the new charges to the line-haul rates would not exceed, *in toto*, a just and reasonable level; properly found that the addition of the new charges to the existing line-haul rates would not result in diversion of grain traffic from railroads to other modes of transportation; and properly omitted from its consideration the question of whether the railroads had a need for any increase in revenue from grain traffic as a result of the new charges in view of the evidence of record that inspections need not be performed at all and that the charges may be entirely avoided by taking inspections, if desired, elsewhere than in transit on carriers' tracks.

16. Intervenor-defendants deny each and every allegation in paragraph 16 (erroneously numbered 15) of the Complaint and aver that the Commission made adequate findings and conclusions upon all the material issues of fact, law and discretion presented on the record, that such findings and conclusions are fully supported by the evidence of record, and that such findings and conclusions are sufficient in law and in fact to support the Commission's ultimate conclusion that the new charges for the inspection of grain in transit are just and reasonable and otherwise lawful.

WHEREFORE, Intervenor-defendants, The Atchison, Topeka and Santa Fe Railway Company, et al., pray that the orders of the Interstate Commerce Commission in its

Investigation and Suspension Docket No. 8548, of which complaint is made, be affirmed and that all relief prayed for in the Complaint be denied and the Complaint dismissed, and designate Wichita, Kansas, as the place of trial of this action.

.....
William F. Cottrell

.....
Christopher A. Mills

WEIGAND CURFMAN BRAINERD
HARRIS & KAUFMAN

By .....
Charles W. Harris

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APPENDIX I

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, and **EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,** Intervenor-Plaintiff, vs. **THE UNITED STATES OF AMERICA and the INTERSTATE COMMERCE COMMISSION,** Defendants, and **THE ATCHISON, TOPEKA, and SANTA FE RAILWAY COMPANY, ET AL.,** Intervenor-Defendants.	**CIVIL ACTION No. W-4730 THREE-JUDGE COURT**

SEPARATE ANSWER OF INTERVENOR-DEFENDANTS THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., TO SEPARATE COMPLAINT OF EARL L. BUTZ SECRETARY OF AGRICULTURE OF THE UNITED STATES

Intervenor-defendants, The Atchison, Topeka and Santa Fe Railway Company, et al., in answer to the separate complaint of Earl L. Butz, Secretary of Agriculture of the United States ("Intervenor's Complaint"), state:

1. Intervenor-defendants admit the allegations in paragraphs I through IX, inclusive, of the Intervenor's Complaint.

12. Intervenor-defendants deny each and every allegation in paragraph X of the Intervenor's Complaint and aver that the findings and conclusions contained in the Commission's orders of April 16 and September 21, 1971, have a rational basis, are fully supported by the evidence of record before the Commission, and are fully in accordance with the law. Specifically, intervenor-defendants aver:

A. That the Commission properly found that the basic responsibility of the railroads does not require them to provide services for in-transit inspection and that grain inspection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed.

B. That the Commission properly found in view of its outstanding orders in its Docket 17000, Part 7, plus intervening general revenue increases, that the addition of the new charges to the line-haul rates would not exceed a maximum reasonable level, and properly found that the establishment of the additional charges will eliminate at least some of the car detention time due to in-transit inspection and that the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

WHEREFORE, Intervenor-defendants, The Atchison, Topeka and Santa Fe Railway Company, et al., pray that the orders of the Interstate Commerce Commission in its Investigation and Suspension Docket No. 8548, of which complaint is made, be affirmed and that all relief prayed for in the Separate Complaint of Earl L. Butz, Secretary of

Agriculture of the United States be denied and such Complaint dismissed.

William F. Cottrell
Christopher A. Mills

WEIGAND, CURFMAN, BRAINERD, HARRIS & KAUFMAN

Charles W. Harris

[Certificate of Service Omitted in Printing]

APPENDIX J

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, vs. **THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,** Defendants.	**Civil Action No. W-4730**

FILED
MAY 24, 1972
ARTHUR G. JOHNSON, Clerk
By Beth A. Coon, Deputy

JAMES E. BARRETT, United States Circuit Judge
FRANK G. THEIS, United States District Judge
EARL E. O'CONNOR, United States District Judge

OPINION OF THE COURT

PER CURIAM

This is an action to enjoin, annul, set aside, and suspend orders of the Interstate Commerce Commission entered by the Commission, Division 2, on April 16, 1971, and by the Commission en banc on September 21, 1971, in proceedings entitled Investigation and Suspension Docket No. 8548, Inspection in Transit, Grain and Grain Products, reported at 339 I.C.C. 364 and 340 I.C.C. 69 respectively. A three-judge court was convened to hear the case. The suit is brought pursuant to the provisions of Sections 1336, 1398, 2284 and 2321-25 of Title 28 U.S.C.

By the reports and orders here assailed, the Commission has found just and reasonable the establishement of tariff provisions applicable throughout the West at the rate of $13.36 per car for the first in-transit inspection services historically provided by the rail carriers under the line-haul rates. The Commission did not require a reduction in the line-haul rates in relation to the reduced optional service.

The in-transit inspection service with which we are here concerned has reference to the practice of stopping railroad cars loaded with grain and grain products and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the railroad car. The sample or samples tested determine the official grade of the contents of the car for the purpose of establishing its value at market.

This transit service has been historically provided by the rail carriers in the West as part of the line-haul rates. Until 1968, federal law required official federal inspection and sampling. That function was performed by federal officials. That requirement was eliminated by the Congress in 1968. 82 Stat. 761, 7 U.S.C. §§ 71 *et seq.* The primary purpose of the Congress was to effect an increased utilization of rail cars. In its brief the Commission noted that car shortages on a nation-wide basis was a grave problem and that "the Commission's action here represents a determination to employ all rational and lawful means to attempt to alleviate the difficulty."

After extensive hearings the Commission found that: (1) the proposed charges do not apply in any instance where applicable line-haul rates plus the charge would exceed the maximum reasonable rates set forth in Grain and Grain Products, 205 I.C.C. 301 (1934), 215 I.C.C. 83 (1936), (2) inspection of grain is no longer a mandatory requirement

of federal law, (3) there is a need for inspection at some point in the grain marketing process, but inspection in-transit is not essential, and (4) grain inspection in-transit is an "accessorial" service for which a charge separate from the basic line-haul charges may be properly assessed. The Commission then found that the proposed charges were just and reasonable in that the railroads established by substantial evidence that the costs associated with in-transit inspection correspond to the level of the proposed charges and that delays resulting from in-transit inspection amount to more than three days per car. There is substantial evidence in support thereof.

The Commission recognized that the Western railroads were not primarily assessing a charge in their line-haul rates for the first stop for inspection. The protestants here contend that under these circumstances the railroads could not segregate the inspection services and assign to it a separate charge without presenting substantial evidence that the new aggregate rate, composed of the line-haul plus inspection-transit rates, represent a just and reasonable rate for all of the services.

In its discussion and conclusions, the Commission found that: "A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding (Transit Charges, Southern Territory, 332 I.C.C. 664 [1968]) - - - However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here. That difference is that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less

that the maximum reasonable level determined by this Commission." In its brief the Commission refers to the "extreme difficulty" involved in putting together thousands of such rates for the purpose of determining the reasonableness of a charge for a separate accessorial service. The Commission ultimately justified its rationale predicated upon the maximum level of rates which it established some 35 years ago in its Docket No. 17000 proceedings, Grain and Grain Products, *supra.*

While purporting to "distinguish" the instant decision from its prior decisions, the Commission discovered that which had been known for years: the maximum reasonable rates established in its Docket No. 17000 cases. This discovery suddenly became a "significant distinguishing feature" in its decision here.

There may be facts and circumstances justifying a Commission reversal of its well established rule that whenever a proposal is made for the establishment of an additional charge for a service that has been provided at the line-haul rates, the reasonableness of the proposed charge may not be divorced from the line-haul rates, the services thereunder, and the cost thereof. Transit Charges, Southern Territory, 332 I.C.C. 664 (1968); Grand Forks Chamber of Commerce, et al v. Great Northern Railway Company, et al, 321 I.C.C. 356 (1963); Investigation and Suspension Docket No. 5146, Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 (1943); Unloading Lumber to New York Harbor, 256 I.C.C. 463 (1943); Reconsignment Case No. 3, 53 I.C.C. 455 (1919). The difficulty generated by the Commission's ruling here is that instead of repudiating its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall

services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom—which may be legally justified—it has attempted to "distinguish" this case from its prior rulings. In our judgment the Commission has failed in this respect. In effect, the Commission "excuses" the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers "inability" to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are "able" to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible. Secretary of Agriculture v. United States, 347 U.S. 645 (1954), is dispositive of this issue. There, as here, the Commission approved special charges, in addition to the existing line-haul rates, for unloading accessorial services. The protestants appealed contending that the service (a) is an essential part of the line-haul charge in that it relates to delivery, (b) that the line-haul rate encompassed the service and (c) that the service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it. The Supreme Court held that each of these claims must be met by the Commission. The Court held that the Commission had not done so and that it had failed to explain its departure from prior norms and its legal basis for doing so. See also William N. Feinstein & Company v. United States, 209 F.Supp. 613 (S.D. N.Y. 1962); National Small Shipments Traffic Conference, Inc. v. United States, 321 F.Supp. 500 (S.D. N.Y. 1970). The same reasoning applies here. The Commission in the case at bar did not "explain its departure" from its prior norm by its contention that this case can be "distinguished" on the apparent proposition that here the

railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se: In those cases where the Commission determines that the carrier is able to meet the burden of proof that the separate charge is justifiable in relation to its overall line-haul rates, it must do so; on the other hand, in those cases where the rail carried is, in the judgment of the Commission, unable to carry the burden of proof, the separate charge will be approved if it does not exceed the "maximum reasonable rates" established in Grain and Grain Products, *supra*.

We recognize that activities and conditions in dynamic fields may dictate that because of later developments prior administrative construction and interpretation of a statute should no longer be binding if it does not achieve general legislative objectives. National Broadcasting Company v. United States, 319 U.S. 190 (1943). But a specific and long-standing administrative interpretation of a statute should not be overruled except for weighty reasons. Commissioner v. Estate of Sternberger, 348 U.S. 187 (1955). An administrative interpretive rule of long standing has the same force and effect as a statute and rules of evidence apply to both in the same manner.

The Commission here noted that "even though the combined line-haul rate and the proposed charge does not exceed the prescribed maximum level, it is still incumbent on the Commission to determine if the separate charge is reasonable when related to the specific service for which it is to be assessed." 339 I.C.C. at 388. This, then, was a departure from its prior interpretive decisions.

We hold that the Commission has not adequately explained, for purposes of our review, its departure from prior norms. It has not sufficiently spelled out the legal

basis of its decision. The Commission has not repudiated or overruled its prior decisions requiring that a carrier or carriers proposing separate and additional charges for accessorial services previously included within the line-haul rates may only do so if there is substantial evidence that the existing line-haul rates do not adequately cover the entire services. We are not convinced that the instant proceeding can be "distinguished" as the Commission has indicated. It does appear, however, that it has been distinguished by the Commission predicated upon the Commission's own determination of the burden of proof which it will require and impose in variable quantities, at its discretion, on a case-to-case basis.

We do not believe that the findings of the Commission are adequate in relation to our obligations and tasks on review. We recognize, just as the Supreme Court recognized in Secretary of Agriculture v. United States, *supra*, that "the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case." 347 U.S. at 652.

The matter is remanded to the Commission for further proceedings consistent with this opinion. The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court.

Dated this 24th day of May, 1972.

/s/ JAMES E. BARRETT
United States Circuit Judge

/s/ FRANK G. THEIS
United States District Judge

/s/ EARL E. O'CONNOR
United States District Judge

APPENDIX K

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, and **EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,** Intervenor-Plaintiff, vs. **UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,** Defendants, and **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,** Intervenor-Defendants.	**Civil Action No. W-4730 Three-Judge Court**

FILED
JUNE 8, 1972
ARTHUR G. JOHNSON, Clerk
By Jack Crawley, Deputy

ORDER AFFIRMING PREVIOUS OPINION AND DENYING MOTION FOR CORRECTION

Having before it the motion of the Interstate Commerce Commission and the intervening defendant railroads for correction of the opinion of the Court previously filed herein

on May 24, 1972, and having considered the briefs of the parties filed herein relative to correction of the opinion, the Court finds and hereby holds that the opinion as originally filed represents the considered judgment of the Court.

Accordingly, the motion of the defendants for correction of the opinion filed May 24, 1972, is hereby denied and overruled.

IT IS SO ORDERED.

At Wichita, Kansas, this 8th day of June, 1972.

/s/ JAMES E. BARRETT
United States Circuit Judge

/s/ FRANK G. THEIS
United States District Judge

/s/ EARL E. O'CONNOR
Judge

APPENDIX L

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., **Plaintiffs,** **and** **EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,** **Intervenor-Plaintiff,** **vs.** **UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,** **Defendants,** **and** **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,** **Intervenor-Defendants.**	**Civil Action No. W-4730 Three-Judge Court**

FILED
JUNE 9, 1972
ARTHUR G. JOHNSON, Clerk
By Helen Hope, Deputy

NOTICE OF APPEAL BY APPELLANT RAILROADS TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., the Intervening Defendants Western Railroads, hereby appeal to the Supreme Court of the United States from the Opinion

of the above-entitled Court made and entered on May 24, 1972, and from the final order and judgment of the Court affirming the previous Opinion and denying defendants' Motion for Correction of Opinion made and entered on the 8th day of June, 1972.

This appeal is taken pursuant to 28 U.S.C., § 1253.

/s/ CHARLES W. HARRIS
Charles W. Harris
830 First National Bank Building
Wichita, Kansas 67202

WILLIAM F. COTTRELL
CHRISTOPHER A. MILLS
400 West Madison Street
Chicago, Illinois 60606

Attorneys for Intervening Defendants
THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
et al.

[Certificate of Service Omitted in Printing]

APPENDIX M

IN THE

SUPREME COURT OF THE UNITED STATES

SPECIAL TERM, 1972

July 7, 1972

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

ORDER

On consideration of the appellants' application for stay, the appellees' reply to the application, and the affidavits and memoranda filed in support of the application and reply, IT IS ORDERED:

(1) That, subject to the condition set forth in paragraph 2 herein, the judgment of the United States District Court for the District of Kansas entered in this matter on June 8, 1972, be and hereby is stayed pending a final determination of the appeal by this Court.

(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:

(a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and

(b) in the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds. In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.

APPENDIX N

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4730

[Filed July 20, 1972, Arthur G. Johnson, Clerk
By /s/ Helen Hope, Deputy]

THE WICHITA BOARD OF TRADE, et al., PLAINTIFFS

and

EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., INTERVENING DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Interstate Commerce Commission, one of the defendants herein, hereby appeals to the Supreme Court of the United States from the opinion of this Court filed May 24, 1972, and from the final order

of this Court affirming the previous opinion and denying motion for correction filed June 8, 1972. This appeal is taken pursuant to Sections 1253 and 2101 of Title 28, United States Code.

This the 19th day of July, 1972.

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APPENDIX O
List of Appellant Railroads

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Baltimore and Ohio Chicago Terminal Railroad Company
Burlington Northern Inc.
The Chesapeake and Ohio Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and North Western Railway Company
Chicago, Rock Island, and Pacific Railroad Company
Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Erie Lackawanna Railway Company
Fort Dodge, Des Moines & Southern Railway Company
Forth Worth and Denver Railway Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
Kansas City Southern Railway Company
Louisville and Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Monon Railroad Company
Norfolk and Western Railway Company
Penn Central Transportation Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Western Pacific Railroad Company

APPENDIX P

List of Appellee Grain Interests

BOARD OF TRADE OF THE CITY OF CHICAGO
THE BOARD OF TRADE OF KANSAS CITY, MO.
BUNGE CORPORATION
C-G-F GRAIN COMPANY, INC.
CALIFORNIA GRAIN AND FEED ASSOCIATION
CASH GRAIN ASSOCIATION OF THE CHICAGO BOARD OF TRADE
THE DENVER GRAIN EXCHANGE ASSOCIATION
ENID BOARD OF TRADE
FS SERVICES, INC.
FAR-MAR-CO., INC.
FORT WORTH GRAIN EXCHANGE
GARVEY ELEVATORS, INC.
GARVEY GRAIN, INC.
HOLLANDER & FEUERHAKEN
THE HUTCHINSON BOARD OF TRADE
KANSAS CITY GRAIN COMMISSION MEN'S ASSOCIATION
KANSAS GRAIN & FEED DEALERS ASSOCIATION
LINCOLN GRAIN, INC.
LOS ANGELES GRAIN EXCHANGE
MASTERS GRAIN COMPANY
MERCHANTS' EXCHANGE OF ST. LOUIS
MIDWESTERN GRAIN COMPANY—DIVISION OF GARNAC GRAIN CO., INC.
MISSOURI DEPARTMENT OF AGRICULTURE
MISSOURI FARMERS ASSOCIATION, INC.
MOHR-HOLSTEIN COMMISSION CO.
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL GRAIN AND FEED ASSOCIATION
NATIONAL GRAIN TRADE COUNCIL
OMAHA GRAIN EXCHANGE
PACIFIC NORTHWEST GRAIN DEALERS ASSOCIATION, INC.

PEORIA BOARD OF TRADE
PRODUCERS GRAIN CORPORATION
ST. JOSEPH GRAIN EXCHANGE
SIOUX CITY GRAIN EXCHANGE
STATE CORPORATION COMMISSION OF THE STATE OF KANSAS
STOTLER & COMPANY
UTAH-IDAHO GRAIN EXCHANGE
THE WICHITA BOARD OF TRADE

2-214

NO.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

v.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Kansas

JURISDICTIONAL STATEMENT

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

v.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

On Appeal From The United States District Court For The District Of Kansas

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Kansas, entered on June 8, 1972, suspending rates found just and reasonable by the Interstate Commerce Commission, which judgment was stayed by order of this Court entered July 7, 1972, pending determination of this appeal. Appellants submit this Statement to show that this Court has jurisdiction of the appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the District Court for the District of Kansas is not yet reported. The opinion of Division 2 of the Interstate Commerce Commission is reported at 339

I.C.C. 364 (1971), and was affirmed by the Commission *en banc* in an opinion reported at 340 I.C.C. 69 (1971). Copies of the opinions of Division 2, the Commission *en banc*, and the District Court are attached hereto as Appendices A, B and C.*

JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to set aside an order of the Interstate Commerce Commission. The opinion of the three-judge District Court, convened pursuant to 28 U.S.C. §§ 2325 and 2284, was issued on May 24, 1972. Appellants filed a motion for correction of opinion on May 26, 1972. On June 8, 1972, the District Court denied the motion and entered judgment. On June 9, 1972, appellants filed their notice of appeal. The jurisdiction of this Court to review the District Court's decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). *E.g., Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

QUESTIONS PRESENTED

1. Does a District Court have jurisdiction to suspend railroad rates which the Interstate Commerce Commission had previously suspended for the maximum period provided for by statute and had found to be just and reasonable?

2. Did the Court below violate minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings?

3. Where the Commission specifically found that the proposed charges when added to the existing line-haul rates do not exceed the maximum reasonable level, found that the

* Pages of the Appendices are cited herein as, *e.g.*, "App. A1".

accessorial service for which the charges will be made is no longer necessary to the orderly marketing of the commodity, and found that the proposed charges will make a substantial contribution toward alleviating the serious nationwide shortage of freight cars, was the Court below correct in remanding the matter to the Commission because the Commission did not require specific evidence of revenues, costs, and services as to the thousands of individual line-haul rates involved?

STATUTE INVOLVED

Section 15(7) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(7), provides as follows:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceed-

ing has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

STATEMENT

This appeal arises out of a rate suspension proceeding conducted by the Interstate Commerce Commission under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (*supra*, pp. 3-4), and involving proposed charges for in-transit grain inspection services. The charges were suspended by the Commission for the maximum statutory seven-month period, which was voluntarily extended by the appellant railroads* for an additional six months, and then

* The appellants, railroads operating in the Western District of the United States, are enumerated in the list attached hereto as Appendix G.

went into effect. The Commission found that the charges were just, reasonable and otherwise lawful and would "make a substantial contribution toward the improvement of the national freight car supply" (App. A51).

An action to review the Commission's order was brought in the District Court by the appellees, consisting principally of certain grain dealers and exchanges. The Court remanded the matter to the Commission for further proceedings and *sua sponte* suspended the charges which had been in effect for over a year.

On July 7, 1972, this Court entered an order staying the District Court's judgment pending determination of this appeal.

1. In-Transit Grain Inspection

Prior to 1968, the United States Grain Standards Act, 7 U.S.C. § 71 *et seq.*, required inspection of interstate grain shipments to determine the official grade of the contents for the purpose of establishing the value of the commodity at grain markets. The inspection requirement could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been unloaded. However, it was "convenient for grain shippers and receivers to have the grain inspected while in transit" (App. A12). This procedure involves stopping the loaded railroad cars en route, switching them to separate track facilities where they are held for sampling and grading, awaiting disposition orders from the shippers after inspection, and switching the cars back into line-haul movement. The interruption in the line-haul resulting from in-transit inspection amounts to an average delay of more than three days per inspection (App. C3, A34-42, A48).

In 1968 Congress, by amendment to the United States Grain Standards Act, eliminated the requirement of grain

inspection (P.L. 90-487, 82 Stat. 761). As stated by the Court below (App. C2), "The primary purpose of the Congress was to effect an increased utilization of rail cars."

Despite the repeal of the inspection requirement and the availability of alternative sampling methods (including recently developed automatic samplers), in-transit grain inspections continued in large numbers. In 1968 there were 464,000 in-transit inspections on 16 western railroads; in 1969, 488,000 on 15 western railroads (App. A5). During this period there also continued to be a nationwide shortage of freight cars which became critical during grain harvest periods (App. A49).

2. The Challenged Tariffs

In order to reduce the number of in-transit inspections and thereby increase the available car supply, the appellants filed schedules with the Interstate Commerce Commission, to become effective March 28, 1970, proposing a charge of approximately $13.50 per car for each in-transit inspection.* Appellants had previously provided the service without a separate charge, although a separate charge for in-transit inspection had been established in the East in 1963 (App. A9).

Under the proposed tariffs, the inspection charges when added to the line-haul rates would in no event exceed the maximum level of rates on grain in the West established by the Commission. These maxima, first determined by the Commission in two general investigations reported in *Grain and Grain Products*, 205 I.C.C. 301 (1934) and 215 I.C.C. 83 (1936) (referred to as Docket No. 17000, Part 7), have been subjected to continuous review and have been readjusted through subsequent general increases. As noted by the Commission (App. A33), "[t]here is possibly no segment

* The current charge is approximately $16 as a result of subsequent general revenue increases.

of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products."

3. The Commission Proceeding

In response to protests filed by the appellees and others, the proposed charges were suspended by the Commission pursuant to § 15(7) for the statutory seven-month period, which the appellant railroads voluntarily extended for an additional six months. On April 16, 1971, Division 2 of the Commission issued its decision finding the proposed charges just, reasonable and otherwise lawful, based on the following "chief subsidiary findings" (App. A51):

> "1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.
>
> "2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*
>
> "3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.
>
> "4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply."

The proposed charges became effective on May 4, 1971. On petitions for reconsideration, the Commission *en banc* affirmed the Division 2 decision on September 21, 1971, retaining jurisdiction to receive and consider reports which the Commission ordered the railroads to submit showing revenue derived from the inspection charges (App. B9).*

4. The District Court Proceeding

Appellees (less than a third of whom participated in the Commission proceeding) filed this action in the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1336 to enjoin the order of the Commission. Appellant railroads intervened in support of the order and appellee Secretary of Agriculture intervened in support of plaintiffs' complaint.

In accordance with 28 U.S.C. § 2325, the case was heard by a three-judge court. In its opinion entered May 24, 1972, the Court concluded that ". . . the Commission has not adequately explained, for purposes of our review, its departure from prior norms" (App. C6). The Court ordered the matter "remanded to the Commission for further proceedings consistent with this opinion" (App. C7). In addition, although plaintiffs-appellees had not even requested such relief, the Court below, without discussing its authority to do so, ordered that the inspection charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (App. C7).

---

* Pursuant to this order, appellants on July 7, 1972, filed their first report with the Commission summarizing the effect of the inspection charges during the first six-month reporting period. The report shows that 25.0% of the grain shipments on the 17 carriers reporting complete data were inspected in-transit during this period as compared with 59.8% for the same six months in the year before the inspection charges took effect.

Appellants on May 26, 1972, filed a motion for correction of opinion in which they contended that the District Court had exceeded its authority by suspending the charges. By order entered June 8, 1972 (a copy of which is attached hereto as Appendix D), the District Court denied the motion.

On June 9, 1972, appellants filed in the District Court a notice of appeal (a copy of which is attached hereto as Appendix E) and a motion for stay of judgment pending determination of the appeal to this Court.* The motion was denied on June 19, 1972.

5. The Stay Order

Appellants thereafter applied to this Court for stay of the District Court's judgment on the grounds that the issues on appeal are significant and that the District Court's suspension of the inspection charges would result in a serious shortage of freight cars causing substantial and irreparable injury to the public, the grain industry and the railroads. Appellants proposed that the stay be conditioned on their accounting for inspection charges collected during the period of the stay and refunding such amounts in the event of affirmance. Supporting affidavits which had been submitted to the District Court were appended to the application to this Court.

On July 7, 1972, this Court entered an order, subject to an accounting and refund condition, staying the judgment of the District Court pending determination of this appeal. A copy of the order is attached hereto as Appendix F.

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* The Interstate Commerce Commission filed its notice of appeal on July 19, 1972.

THE QUESTIONS ARE SUBSTANTIAL

Underlying each of the questions presented by this appeal is the improper interference by the Court below with the powers and responsibilities of the Interstate Commerce Commission to determine the reasonableness of rates and to deal with matters of vital importance to the national transportation system.

In suspending charges which had been in effect for more than a year, the Court below acted beyond its jurisdiction and in square conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

The Court below also failed to meet the most elementary standards of judicial review by setting aside the Commission's order on the basis of a *dictum* taken out of context, by ignoring the clearly stated findings of the Commission, by imposing a "norm" which does not exist in prior decisions, and by applying a rigid rule of *stare decisis* which is inapplicable to judicial review of administrative decisions. The Court further misconceived the function and scope of Commission proceedings under § 15(7), as defined by this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

The importance of the case is enhanced by the great public interest in relieving the "recurring shortages of freight cars available to serve the Nation's shippers". *United States* v. *Allegheny-Ludlum Steel Corp.*, ... U.S. ... (June 7, 1972).

I. THE ORDER OF THE COURT BELOW SUSPENDING THE CHARGES WAS BEYOND ITS JURISDICTION AND IN DIRECT CONFLICT WITH THIS COURT'S ARROW DECISION.

Section 15(7) (*supra*, pp. 3-4) authorizes the Commission under certain conditions to suspend the operation of a railroad's newly filed schedule of charges "but not for a longer period than seven months beyond the time when it would otherwise go into effect". Pursuant to this provision, the challenged tariffs were suspended by the Commission for the maximum seven-month period (which the railroads voluntarily extended for an additional six months). After the rates had been in effect for more than a year, the Court below *sua sponte* suspended the charges and decreed that they "shall be ineffective until and unless otherwise ordered by" the Court below. That decision is in direct conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

In *Arrow*, this Court held that § 15(7) vests in the Commission the exclusive power to suspend proposed rates and that the courts lack the power to suspend such rates or to extend the maximum suspension period provided by the statute. In considering an attempt to enjoin carrier-initiated rates which (like the charges in the instant case) had been suspended for the statutory seven-month period, the Court stated:

> ". . . we cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head.
>
> "Moreover, Congress engaged in a protracted controversy concerning the period for which the Commission might suspend a change of rates. Such a controversy would have been a futile exercise unless the Congress also meant to foreclose judicial power to extend that period." 372 U.S. at 664.

• • •

> "We cannot believe that Congress would have given such detailed consideration to the period of suspension unless *it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief.*" Id. at 667 (emphasis added).
>
> • • •
>
> "There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. Texas & P. R. Co. v. Abilene Cotton Oil Co. 204 U.S. 426, 51 L.Ed. 553, 27 S. Ct. 350. This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive." Id. at 668 (footnote omitted).

The power which the Court below purported to exercise is precisely the power which this Court held in *Arrow* was withdrawn by Congress from the judiciary. Thus, the District Court's action is not only in square conflict with *Arrow* but also is patently beyond the jurisdiction of any federal court.

The sole factual difference between the instant case and *Arrow* is that there the Commission § 15(7) proceeding had not been consummated at the time a judicial suspension was initially sought in the District Court.* As Chief Judge Friendly of the Second Circuit held in *National Small*

* However, at the time of this Court's decision, Division 2 had announced its decision sustaining the challenged tariffs, and that decision was awaiting possible reconsideration by the Commission. 372 U.S. at 660 footnote 2. The whole thrust of the *Arrow* opinion is flatly contrary to any notion that the injunction remedy prohibited by *Arrow* would suddenly become available as soon as the Commission disposed of the petition for reconsideration.

Shipments Traffic Conference, Inc. v. *United States*, 321 F. Supp. 500, 515 (S.D.N.Y. 1970), a case involving § 216(g) of the Interstate Commerce Act,* this factual difference has no legal significance:

> "The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agreement; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. We see no relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. *In neither situation can we direct the Commission to reinstitute a suspension which has already continued as long as Congress allows.*" (Emphasis added.)

Congress, as both the *Arrow* and *National Small Shipments* decisions recognize, "vest[ed] in the Commission the sole and exclusive power to suspend" (372 U.S. at 667), and the judgment below is in direct conflict with both those decisions.

II. THE COURT BELOW APPLIED PATENTLY ERRONEOUS LEGAL STANDARDS OF JUDICIAL REVIEW.

The Court below not only intruded into the Commission's exclusive suspension power under § 15(7), but also applied patently erroneous legal standards of judicial review.

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*49 U.S.C. § 316(g). Section 216(g) is applicable to motor carriers under Part II of the Act and contains the same statutory suspension language as § 15(7).

It would seem axiomatic that the first task of a reviewing court is to consider the agency's findings. Here, the Commission made four "chief subsidiary findings that lead [it] to the ultimate conclusion that the considered schedules are just and reasonable":

> (1) that in-transit inspection is no longer essential to the orderly marketing of grain;
>
> (2) *that the line-haul rates even when increased by the proposed charges do not exceed the maximum reasonable level prescribed by the Commission;*
>
> (3) that (based on detailed detention and cost studies) the proposed charges are themselves just and reasonable for the service to be rendered; and
>
> (4) that "the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply".

The Court below appears to have sustained these findings (App. C2-3). But the Court then proceeded, for all practical purposes, to ignore them. Instead, the Court based its entire decision on its dissatisfaction with a Commission *dictum* setting forth a subordinate ground for distinguishing a prior Commission decision.

In its opinion, as distinguished from its "chief subsidiary findings", the Commission noted that its prior decision in *Transit Charges, Southern Territory,* 332 I.C.C. 664 (1968),* was distinguishable in two respects. Preliminarily, the Commission commented on the impracticality of requiring detailed analysis of every line-haul rate in-

* The Commission's order was sustained, on other grounds, in *Cin. N. O. & T.P.R. Co.* v. *United States* (unreported) (S.D. Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970).

volved.* But the Commission's opinion then states (App. A32-33): "However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here"—*i.e.*, "that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission" and that "In no instance will the combined rate and charge exceed the maximum level prescribed. . . ." In its "chief subsidiary findings", the Commission relied exclusively on this second "more significant" distinction, stating that "Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra*" (App. A51).

The Court below, however, disregarded the Commission's findings and analysis, and instead seized on the Commission's *dictum* as a basis for setting aside the Commission's order. According to the Court's extraordinary reconstruction of the Commission's decision (App. C5-6):

> "In effect, the Commission 'excuses' the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers 'inability' to meet that obligation here. In other words, the rule is viable and applicable where the Commission

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*"As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge." (App. A32). The Commission's language bears a striking similarity to this Court's statement in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943) (see *infra*, p. 18).

> determines that the railroads are 'able' to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible."
>
> • • •
>
> "The Commission in the case at bar did not 'explain its departure' from its prior norm by its contention that this case can be 'distinguished' on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se. . . ."

The Court's reasoning is defective on an abundance of grounds:

First of all, even the most casual examination of the Commission decision demonstrates that the District Court's restatement of the Commission's position does not even remotely resemble what the agency actually decided. Both in its opinion and particularly its findings, the Commission made it as clear as language will permit that "the more significant distinguishing feature that persuades us" is that the total of the line-haul rate and the inspection charge still did not exceed the maximum reasonable level. The Commission did not "excuse" anyone from meeting a requirement; and it did not, unwittingly or otherwise, adopt a "discriminatory" evidentiary rule.

Second, it is a wholly improper exercise of judicial review to base the Court's decision, not on the agency's findings, but on a *dictum* torn from the the context of the agency's opinion. Where, as here, the agency carefully enumerates its findings, surely minimal standards of judicial review require that the reviewing court address itself to those findings—rather than concentrate on a single *dictum* and then, remarkably, set aside the agency's order on the ground that the agency did not adequately explain its decision.

Third, the Commission is not rigidly bound by a doctrine of *stare decisis*. As this Court held in *Virginian Ry.* v. *United States*, 272 U.S. 658, 665-6 (1927), a reviewing court "has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or *with the alleged inconsistency of findings made in other proceedings before it.*" (Emphasis added.) The District Court's attempt to restrict the Commission to a supposed "norm" constitutes an improper encroachment upon the authority of the Commission to deal with matters vital to the national transportation system—here, the serious nationwide shortage of freight cars.*

Fourth and finally, the whole premise of the District Court's opinion—*i.e.*, that the Commission "departed" from some "norm" but failed to adequately explain why—is demonstrably false. Contrary to that premise, the Commission did not "depart" from any "norm", and the Court's attempted reliance on *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), is wholly misplaced.

The Court below (App. C4-5) imputed to the Commission a "long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom. . . ." If the District Court means by this "rule" a requirement that the Commission in a § 15(7) proceeding must make a definitive adjudication of every individual line-haul rate involved,

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* See 49 U.S.C. § 15a(2), which provides in pertinent part: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; . . ."

there clearly is no such "rule". Such a requirement, this Court held in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), would be contrary to the limited purpose of § 15(7). In language remarkably applicable to the instant case, the Court pointed out (p. 689):

> "The construction contended for would have the effect either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15(7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to 'readjust the entire rate structure of an important section of the country.'"

Moreover, the Court held (p. 687) that rates not specifically adjudicated in a § 15(7) proceeding ". . . stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations". Such rates may still be challenged through, *e.g.*, a complaint proceeding under Section 13(1) of the Act, 49 U.S.C. § 13(1), or by a request that a lower maximum level be established under Section 15(1), 49 U.S.C. § 15(1).

On the other hand, if the District Court means by the stated "rule" that the Commission in such cases has usually considered not only the reasonableness of the proposed charge for the service but also the overall reasonableness of the combination of the proposed charges and the line-haul rates,* then the Commission's decision here is in full

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* *E.g., Lighterage and Storage Regulations at New York,* 35 I.C.C. 47, 61 (1915) (separate charge cannot be allowed "without taking into consideration" the aggregate charges); *Reconsignment Case No. 3,* 53 I.C.C. 455, 468-69 (1919) (same; also stresses importance of whether inspection is required by federal law); *Unloading Lumber to New York Harbor,* 256 I.C.C. 463, 468 (1943) (requires "an adequate showing" that the aggregate charges are reasonable).

accord with such a "rule"; for the Commission specifically found that the combination did not exceed the maximum reasonable level (App. A33, A51, B4).

By contrast, in the *Transit Charges* case, it was found *inter alia* that "the imposition of the proposed additional $22 per car *may well result in rates and charges which exceed reasonable maxima*" (332 I.C.C. at 686) (emphasis added). And in *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), it appears that the Commission made no determination of the reasonableness of the aggregate charges.

Furthermore, the nature of the service involved in *Secretary of Agriculture* v. *United States* was fundamentally different. At issue there was a special charge for unloading which had to be performed by the carrier since the goods were not accessible to the consignees. The Court pointed out that "the unloading is an essential part of the delivery and hence is necessarily encompassed in the line-haul" (347 U.S. at 652). In such cases, where the service involved is, by law or otherwise, an integral part of the line-haul transportation, closer scrutiny of the line-haul rate is usually required.* By contrast, the Commission in the instant case found that "it is not essential that the grade of grain be determined while the particular shipment is in transit on the railroad" (App. A12); that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (App. A13); that "There are numerous shipments of the grain where in-transit in-

* See also, *e.g.*, *Unloading Lumber at New York Harbor*, 256 I.C.C. 463, 468 (1943) ("The nature and incidents of the unloading service here considered establish beyond a doubt that it is inextricably bound up with the line-haul service"); *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673, 676 (1943) ("Switching or drayage . . . are not special services . . . but are a part of the through transportation service").

spections are not performed" (App. A13); that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (App. A13); and that such inspection "is an accessorial service for which a charge separate from the line-haul rates may properly be assessed" (App. A14).

Only by disregarding these and other findings of the Commission could the District Court infer some "departure" from an alleged Commission "norm". Furthermore, "In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions". *Secretary of Agriculture* v. *United States*, 347 U.S. at 652. In that case, unlike this one, the service was one "necessarily encompassed in the line-haul" (pp. 652, 654) and the Commission had failed to consider—as it did here—the reasonableness of the aggregate charges. Yet, even in that situation, the Court emphasized that ". . . the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case" (p. 652).

Here, given "the unique circumstances of this case", the Commission concluded that in-transit grain inspections are *not* an integral part of the line-haul transportation but, in fact, a serious *interruption* which the Commission determined is a significant factor in the nationwide freight car shortage problem. The Commission approved the proposed charges not so much as compensation for a service (although the Commission carefully determined that the charges were just and reasonable for the service performed) but as a deterrent to in-transit inspections that unnecessarily tie up badly needed freight cars.

The decision of the District Court, however, ignores "the unique circumstances of this case" set forth in the Commission's findings and conclusions, misconceives the nature

and scope of a § 15(7) proceeding, and violates the most basic standards of judicial review.

For the foregoing reasons, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and that an order noting probable jurisdiction should be entered.

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Dated: August 8, 1972

APPENDIX A

It has been determined by the Commission that this proceeding involves an issue of general transportation importance. Thus, under the provisions of section 1.101 of the General Rules of Practice, parties of record dissatisfied with the decision may file a petition for reconsideration by the Commission.

Served April 21, 1971

30553

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

INVESTIGATION AND SUSPENSION DOCKET No. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided April 16, 1971

Proposed new or increased charges for in-transit inspection of grain at various points in the United States found just and reasonable and otherwise lawful. Proceeding discontinued.

Martin W. Cassell, William F. Cottrell, John A. Daily, Harry L. DeLung, Jr., Richard S. M. Emrich III, Louis A. Harris, Roger K. Johnson, Richard W. Kienle, Howard D. Koontz, Charles N. Marshall, Christopher A. Mills, Howard E. Roos, and *Richard J. Schreiber* for respondents.

Richard H. Stokes and *George M. Onken* for intervener supporting respondents.

John Miles Powell for the Secretary of Agriculture of the United States, protestant.

John M. Agrey, C. L. Brennan, William F. Brooks, Williad R. Clarkson, S. O. Cowley, J. M. Cranor, W. T. Drannan, W. Boyd Evans, Jack Glaves, Melvin M. Gradert, Robert L. Graves, Jon C. Hanson, C. J. Harriss, R. R.

Hughes, W. H. Hollan, James J. Ireland, Rodman Kober, William J. Keating, George W. Lehnen III, C. G. Mathews, C. A. Poelker, Jr., Frank E. Polom, Jerry T. Ratledge, Daniel J. Sweeney, and *Henry J. Yunck* for other protestants.

REPORT AND ORDER

DIVISION 2, COMMISSIONERS WALRATH, JACKSON, AND BREWER

WALRATH, *Commissioner:*

Due and timely execution of our functions under section 15(7) of the Interstate Commerce Act imperatively requires the omission of a hearing examiner's report and recommended order. Requested findings not specifically discussed in this report nor reflected in our findings and conclusions have been considered and found not justified.

By schedules filed to become effective March 28, 1970, and later, the Traffic Executive Association of Eastern Railroads, together with other rail publishing agents and individual rail carriers, proposed to establish new or increased charges for the first in-transit inspection of grain and grain products at points in the United States. Upon the protest of interested shippers and other parties, the proposed schedules were suspended by the Commission, Board of Suspension, to and including October 27, 1970. A joint petition of the respondent rail carriers, filed April 16, 1970, for reconsideration and vacation of the order of suspension was denied by the Commission, division 2, on May 21, 1970. Respondents have voluntarily postponed the effective date of the schedules to April 24, 2971.

By order dated April 7, 1970, the Commission prescribed special rules of procedure and assigned the proceeding for hearing before a hearing examiner. Hearings were held July 13 to July 22 and August 13 and 14, 1970, in Washing-

ton, D.C., and in Chicago, Ill., July 27 through August 4, 1970. Briefs were filed October 12, 1970.

The Long Island Rail Road Company intervened in support of respondents. Numerous protests were filed against the proposed schedules and many of the protestants are active participants in this proceeding. They include the Secretary of Agriculture of the United States, State Corporation Commission of the State of Kansas, Missouri Department of Agriculture, North Dakota Public Service Commission, the Boards of Trade at Kansas City, Mo., and Chicago, Ill., and grain exchanges at Omaha, Nebr., Minneapolis, Minn., Sioux City, Iowa, St. Louis, Mo., and Fort Worth, Tex. Appearances were also made by the National Grain Trade Council and the National Grain and Feed Dealers Association on behalf of their members and by representatives of a number of individual grain concerns such as the Continental Grain Company and Garvey, Inc. The latter has extensive grain interests in Kansas, Texas, Illinois, and North Dakota.

In-transit inspection has reference to the practice of stopping railroad cars loaded with grain and grain products, including soybeans, and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the railroad car. The indicated inspection is the taking of a representative sample or samples to determine the official grade of the contents of the car for the purpose of establishing value of the commodity at the market. It does not include any inspection on tracks of the shipper at either origin or destination. The charges[1] per car for in-transit

1. Charges stated herein are subject to *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, and subsequently authorized general increases.

inspection, under currently effective tariffs, are as follows:

	First stop	Second and subsequent stops
Within eastern territory	$7.42	$13.29
Within Illinois territory	None	14.33
Within southern territory	None	12.51
Within western territory: Border markets along the Mississippi River and northern Illinois.	None	14.33
Within western territory: On and east of the Missouri River markets, also Minneapolis-St. Paul, Duluth-Superior and points east thereof.	None	13.78
Within western territory: West of the Missouri River including southwestern territory, and west of Minneapolis-St. Paul and Duluth-Superior.	None	13.36

The proposed per-car charges for each stop, including the first stop, on the rail carriers' tracks for inspection are (1) within Eastern, Illinois, and Southern Freight Association territories— $14.33; (2) on and east of the Missouri River markets, also Minneapolis-St. Paul, and Duluth-Superior and points east thereof— $13.78; and (3) west of the Missouri River, including southwestern territory, and west of Minneapolis-St. Paul and Duluth-Superior—$13.36. It should be stressed that the in-transit inspection is primarily an operation in the West. Respondents' studies indicate that there were 464,000 inspections on 16 western railroads in 1968 and 488,000 on 15 western railroads in 1969. There was a much smaller number of inspections in the East and the South. In the South, inspection on carriers' tracks is regularly performed at only four locations, all of which are export ports.

Background.—A brief description of production and marketing of the considered commodities, their importance to the Nation's economy and to the railroads, and the significance of the transportation charges is helpful to an under-

standing of the issues presented in the instant proceeding.[2]

For the most part, the various grains[3] are grown in the farming or agricultural States that form a rough crescent from Ohio in the east through to Montana, Idaho, Oregon, and Washington, in the west and around to Oklahoma and Texas in the Southwest. The greatest production of wheat is found in Colorado, Kansas, Nebraska, North Dakota, Montana, Oklahoma, Oregon, and Washington. Corn and oats are produced in large quantities in Iowa, Nebraska, Minnesota, Missouri, Illinois, Indiana, and Ohio. The sorghum production is heaviest in Texas, Kansas, and Oklahoma, and soybeans are grown principally in Illinois, Indiana, Ohio, and Arkansas.

The total amount of grain grown in these States is substantial. The 1969 estimates show that total grain production in Iowa is in excess of 1.2 billion bushels and Kansas and Nebraska are each shown to have produced more than 600 million bushels. Some 300 million bushels were produced in Missouri and the yield of both Montana and Washington during the same year was in excess of 100 million bushels. Oklahoma and Texas are also producers of large quantities of grain. The former's wheat production in 1969 exceeded 100 million bushels and Texas produced nearly 70 million

2. A more detailed description is available in two general investigations instituted by the Commission pursuant to a resolution of the Congress. The first was directed to the railroad movement of grain and grain products within the western district and for export and is reported in *Grain and Grain Products*, 205 I.C.C. 301, and 215 I.C.C. 83. This proceeding is sometimes referred to in this report as docket No. 17000, Part 7. The second concerned the movement of the same commodities in the South and is set forth in *Grain To, From, and Within Southern Territory*, in 259 I.C.C. 629. There is also a more recent summary in *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967).

3. Grain, unless otherwise indicated, includes corn, wheat, oats, barley, rye, sorghums, and soybeans.

bushels of wheat and more than 300 million bushels of sorghum grains. There is also a substantial production of grain, particularly corn and soybeans, in Illinois and Indiana. The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) transported more than 3,700 carloads of Illinois corn and nearly 700 carloads of Illinois soybeans in 1969. The Chicago and North Western Railway Company (C&NW) originated approximately 5,000 carloads of corn and 1,000 carloads of soybeans in Illinois during the same year.

Enormous quantities of grain move from the country origin points to the nearest price-fixing or first markets. The Missouri River markets of Sioux City, Omaha, Atchison and Leavenworth, Kans., and St. Joseph and Kansas City, Mo., serve the producing areas west thereof, and, with the gulf ports, grain from the southwestern States. Duluth, St. Paul, and Minneapolis, Minn., and Superior, Wis., act in the same capacity on the easterly flow of grain from producing areas in the Dakotas, Montana, and Minnesota. Chicago and St. Louis are important first markets for grain grown in the producing areas east of the Missouri River.

Receipts at Chicago are indicative of the importance of the grain markets. In 1969, slightly more than 194 million bushels of grain were received there, of which approximately 98 million were delivered by railroad. Some 81 million bushels were delivered by truck and about 15 million bushels were delivered via water carriers. The grain receipts at the other markets are also substantial.

The grain traffic is extremely significant tonnage for the railroads, particularly those in the West. In 1969, the Chicago and North Western Railway originated 118,348 carloads of grain. This reflected 8.6 percent of their total carload traffic and 11.83 percent of total carload gross freight revenues. The railroads that merged to form the

Burlington Northern (BN) carried some 20.5 million tons of grain in the same year, which represented 13.2 percent of the gross tons of all their carload freight traffic. The revenue earned for handling this tonnage was $117.7 million and constituted 14.9 percent of gross revenues. The Atchison, Topeka and Santa Fe Railway Company (Santa Fe) for 1968 showed that the movement of wheat and sorghum grains accounted for 6.63 percent of its total revenue and 12.1 percent of total tonnage carried. Similar figures are submitted by the other western railroad respondents and, while tonnages and revenues varied, grain traffic is shown to be particularly significant in every instance.

The rate structure applicable to the railroad movement of grain and grain products from the West to the East and Southeast differs from that applied in connection with other commodities. For the purpose of this report, it is sufficient to state that the freight charges are generally determined from the application of combination rates composed of gathering rates to the price-fixing or first markets and proportional rates beyond. This rate structure is described in the Commission proceedings[4] mentioned earlier. Under the structure, certain services are historically provided by the railroads. One such service is transit, which is the privilege of stopping a grain shipment prior to final destination for storage or processing with later reshipment to destination at freight charges for the entire movement no higher than the charges assessed for uninterrupted movement from origin to destination. Another such service is inspection and sampling. Until recently, official inspection was required by Federal statute. Both transit and inspection were authorized originally without any additional charge. Separate or additional charges for transit and inspection services, however, have been assessed in recent

4. *Grain and Grain Products*, 205 I.C.C. 301, 215 I.C.C. 83, and Rate Structure Investigation, Part 7, *supra*.

years in connection with particular movements of grain and grain products under specific rates, and, in the East, a separate charge for the first inspection of a carload of grain was established in 1963. However, the practice in the western district has been to permit the first inspection without any charge. The proposed schedules, if they become effective, will change this practice.

For many years, the railroads that originated substantial quantities of grain have made provision for sampling and inspection while the loaded cars were in transit. The provisions of the Federal statute requiring an inspection to establish the official grade could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been unloaded. However, as a practical matter, it was easier for the grain trade if the samples on which inspection is made were drawn from the loaded railroad car and the inspection completed before the grain was unloaded. This was established as the practice and the Commission approved and provided for the continuance of the in-transit inspection at the line-haul rates in *Grain and Grain Products, supra.* There has been some erosion of the rail carrier practice of providing for the inspection in transit. This has been true where the railroads have established special reduced rates for particular movements of grain. However, the Docket No. 17000, Part 7, maximum rates which have limited application in the West, and the currently effective rates for general application which are on a lower level than the prescribed basis, continue to authorize the transit and inspection services that have long been available to the grain shippers. Where Docket No. 17000, Part 7, maximum rates are applicable, the charges proposed here do not apply. Nor will the charges apply where the line-haul rates plus the inspection charge equals or exceeds the maximum prescribed level. Thus the prescribed level will not be exceeded under this proposal.

The issue before the Commission in this proceeding is whether or not the proposed departure from the established practice of providing the inspection service is just and reasonable. The grain shippers continue to make extensive use of the prevailing in-transit inspection service, and if the proposed charges become effective it will result in either increased cost to the shippers or in modification of current practices.

Prior to 1967, the United States Grain Standards Act provided that all interstate movements of whole grains, sold by grade and shipped to or from designated markets, be inspected for the purpose of determining their official grade. This provision was originally designed to protect the purchasers of grain. However, beginning sometime in the early 1960's it became apparent that the requirement of mandatory inspection of interstate grain movements had ceased to serve its original purpose. The increasing diversion of bulk grain movements from railroad to other transportation modes, particularly to motor trucks, rendered uniform enforcement of the mandatory inspection requirement difficult. In-transit services are not available by other modes of transportation. In addition, a part of the grain trade found it expedient to market grain without benefit of official grade determination by the U.S. Department of Agriculture. For these reasons the U.S. Secretary of Agriculture proposed the 1968 revision of the Grain Standards Act which eliminated the mandatory inspection. The primary objective of the revision was to expedite and simplify the movement of whole grains. The railroad industry supported the elimination of the inspection requirement because they believe such action would improve car utilization. They were supported in this position by some Federal and State agencies.

Several of the protestants objected to the receipt of evidence submitted by the respondent railroads purporting to show that improved car utilization was a major objective

of the 1968 revision. They have renewed their objection in briefs contending that the hearing examiner improperly received evidence of the legislative history of the revised act including testimony of witnesses before congressional committees. The evidence was properly received by the examiner and his ruling is affirmed. Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute. However, it is equally clear that improved car utilization in the movement of whole grain by railroad was a consideration in the revision.

Need for in-transit inspection.—Before looking to the level of the proposed charges in relation to the services performed in connection therewith, and the corollary question directed to the inclusion of the cost for such services in the line-haul rates, it is helpful to examine into the present need for in-transit inspection. An important segment of the opposition is based on the proposition that such inspection is essential to the orderly marketing of whole grains and that the substitute or alternative inspections at origin or destination, advocated by the respondents, is unacceptable to the grain trade for a number of reasons. The respondent carriers, while urging that the overriding justification for the proposed schedules is the critical need for improvement of car utilization, submit that there is no longer any real necessity for the in-transit inspection service.

We have noted that there is a substantial use of the considered inspection service, especially in the West. Some grain shipments even received two in-transit inspections without the imposition of any additional charge. Generally, the tariffs applicable to the movement of grain in the West provide for only one inspection without charge and there is a published charge for the second and subsequent inspections. However, in addition to the one free inspection

allowed under the currently effective tariffs, an additional free inspection is permitted at destination where the car is unloaded in lieu of reconsignment.[5] Under the suspended tariffs, a charge would be made in the West for both an intermediate inspection and a destination inspection while on the carriers' tracks. Both inspections are in transit since the car is stopped and held out of its otherwise normal course of movement.

There is a need for a sampling and inspection of the grain at some time during the marketing process. The grade of the particular shipment must be determined before the majority of sales can be consummated. For a number of reasons it has been convenient for grain shippers and receivers to have the grain inspected while in transit. If a variance of the grade from what was offered is shown by the inspection, the shipment can be reconsigned to more appropriate markets. Also, there is less chance of deterioration of the grain following the in-transit inspection than is the case if the inspection is made earlier at the point of origin. Finally, the possibility of bias is lessened if the inspection occurs after the shipment leaves the origin elevator. These factors, along with the mandatory requirement for inspection, were the basis for providing the in-transit inspection originally, and for the Commission's approval of the practice in its reports in the Docket No. 17000, Part 7, proceedings. These are also the factors stressed by protestants in urging that origin and destination inspections are not acceptable to the grain trade. However, it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad. As noted, the inspection is now permissive and it

5. A study by the western railroad respondents in 1967 established that there was an average of 1.6 inspections per shipment. Consequently, a large number of inspections for 1968 and 1969 are duplications or repeat inspections.

can take place elsewhere. The record in this proceeding shows that there is a substantial growth in the use of origin mechanical sampling for inspection. These relatively low-cost samplers[6] are installed in the existing elevator grain spout and are electronically timed and operated. A representative sample of the grain being loaded in the rail car is obtained and taken to an inspection laboratory for analysis and grading. The origin sampling devices are approved under existing regulations of the U.S. Department of Agriculture.

The authorized samplers in Iowa increased from 33 to 75 between August of 1969 and the same month in 1970. During the same period, in Illinois, the number increased from 7 to 15; in Nebraska from 27 to 53; and in Kansas from 11 to 25. This growth is not sufficient as yet to result in a decline in the number of in-transit inspections on the railroads, but the increase in the number of automatic samplers at the origin elevators does show that this method of inspection does not adversely affect the grain marketing process.

The basic responsibility of the railroads does not require them to provide the service for in-transit inspection. The fact that the carriers have provided such service, and have included the cost thereof in their line-haul rates, does not preclude a change or modification of the practice if circumstances justify some revision. Therefore, we conclude that the service made available by the railroads in connection with in-transit inspection is not shown on this record to be essential to the grain marketing process. The in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination. There are numerous shipments of the grain where in-transit inspections are not performed. Grain in-

6. The record shows installation cost to range from $1,000 to $2,000.

spection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed. See *Grand Forks Cham. of Com.* v. *Great Northern Ry. Co.*, 321 I.C.C. 356. Whether the separate charges proposed herein are just and reasonable requires a more extended review of the evidence submitted.

Respondents.—The railroads offer a two-pronged justification for the proposed charges. The asserted primary objective to be attained under the proposed charges is a substantial increase in car utilization through elimination of the delay time required for inspection with a resultant improvement in the critical car shortage. In fact, in brief, the respondents state that "the railroads do not want to collect one penny of the charges proposed." The considered charge is proposed as an incentive to shippers to forego in-transit inspections. Secondly, the respondents, having in mind the burdens that must be met in a proceeding directed to increased charges, attempt also to show that the cost directly related to the performance of the inspection exceeds the charges proposed to be assessed for such service.

Respondent carriers submitted evidence of the decrease in the ratio of revenues to out-of-pocket costs for the movement of whole grains from 218 percent in 1950 to 149 percent in 1966. This data compiled from waybill statistics cost scales, and related publications of the Commission's Bureau of Economics and Bureau of Accounts, are reflected in the following table:

Year (1)	Revenues (2)	Out-of-pocket cost (3)	Ratio of revenue to out-of-pocket cost (4)
			Percent
1950	$3,566,568	$1,637,840	218
1955	4,119,817	2,039,467	202
1960	4,946,158	2,877,519	172
1966	5,205,729	3,490,094	149

The figures in the table represent a 1-percent sample of rail terminations on all grain traffic.[7] Figures later than 1966 are not available. The purpose of the table is to illustrate that during the last 20 years the rates on grain moving by railroad have been reduced and, consequently, the contribution of this traffic to the overhead burden has been lessened due to the reduced rates and increasing cost of operations. Most of the reductions were made by the railroads to meet the increased competition of the motor trucks and barges. The respondents followed procedures used by the Commission's cost finding section to determine the out-of-pocket costs for 1966. Those for the prior years were taken from so-called contribution studies of the same section.[8]

A number of studies were presented by the respondents which purport to show their costs for performing the in-transit inspection. The following cost items are listed by respondents as those created and possibly avoidable by the elimination of grain inspection at in-transit stops on the railroads: (1) car detention and associated car costs, (2) cost of switching the cars to inspection tracks on the railroads, (3) clerical costs associated with inspection, (4) loss and damage costs, (5) excess per diem costs, (6) costs that result from delays in handling other traffic because of cars held for inspection, and (7) costs associated with backhaul movements to provide for inspection.

The first step was to determine the amount of car detention that resulted from stopping the grain cars for inspec-

7. The figures shown in the table should be multiplied by 100 to obtain total figures.

8. Distribution of Rail Revenue Contribution by Commodity Groups, 1960, 1955, 1950.

tion. Five studies were made and they are summarized in the following table:

Summary of all car detention studies

Line	Study carriers	Average delay due to grain inspection	Weight-of-the-evidence considerations		
			Method of selecting study stations	Time period of the study	Annual inspection volume (number of inspections)
(1)	(2)	(3)	(4)	(5)	(6)
		hours			
1	Western	78.01	Random ...	1 year	476,000
1	Eastern	44.91	Judgment ..	3 to 8 months	24,500 (Penn Central only)
3	Northern Pacific.	68.00	Judgment .. (nearly a census)	10 months	8,035 (10 months only)
4	Great Northern—Great Falls.....	92.30	Judgment ..	1 week	Unknown
5	Great Northern—Spokane-Hill yard	92.90	Judgment ..	1 week	Unknown

Because the Western study was based on a random sample, covered the period of 1 full year (1968), and had application to the greatest number of inspections, the respondents contend that it should be accorded the greatest weight. In the Western study, 18 study stations[9] were selected at random from the complete list of 217 stations where grain inspection occurred in 1968 on the 16 western railroads[10] that participated in the study. At each of the

9. They are listed in appendix B.

10. Atchison, Topeka and Santa Fe Railway Company (Santa Fe); Chicago, Burlington & Quincy Railroad Company, The Colorado and Southern Railway Company, Fort Worth and Denver Railway Company (these three are now a part of Burlington Northern); Chicago and North Western Railway Company (C&NW); Chicago Rock Island and Pacific Railroad Company (Rock Island); The Denver and Rio Grande Western Railroad Company (Rio Grande); Illinois Central Railroad Company; Kansas City Southern Railway Company; Louisiana & Arkansas Railway Company; Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee); Missouri Pacific Railroad Company; Texas and Pacific Railway Company; St. Louis-San Francisco Railway Company; Southern Pacific Company, and Union Pacific Railroad Company.

18 study stations, a simple random sample of inspected cars and a simple random sample of uninspected cars was chosen.[11] The difference in average handling times between inspected cars and uninspected cars at each station is the delay time due to grain inspection at that station. Eighteen delay times were obtained for grain inspection, one delay time for each study station. These 18 delay times were then combined using a weighted average formula to obtain the result shown in the table.

From the beginning the two groups of cars at each station were made comparable in four respects: year, commodity, station, and method of arrival. A group of inspected cars was compared with a group of uninspected cars that moved in the same year, carried a grain subject to the proposed charge, were handled at the same station, and arrived on a road train of the reporting carrier. Subsequent to the start of the study, an adjustment was made based on segregating all study cars into one of three movement types—delivered at the study station, moving through the study station but taking an intertrain switch to do so, and moving through the study station on the same train. Respondents assert that the figure of 78.01 hours is based on groups that are comparable in five respects: year, commodity, station, method of arrival, and type of movement. The results are shown in appendix B.

Respondents used this adjusted delay time (78.01 hours) to determine the cost of the delay for an inspection of a grain car in the western district. This cost was computed on several bases as outlined in the following table:

11. In two cases (inspected cars at Belmond and Stockton), there were less than 100 cars and for these, every car was studied. In the other 34 cases, samples of approximately 100 cars were used.

Using adjusted delay time of 78.01 hours or 3.25 days

Cost groupings[1] (1)	Days detention (2)	Cost per day (3)	Total cost per inspection (4)
I	3.25	$3.12	$10.14
II	3.25	2.56	8.32
III	3.25	2.79	9.07
IV	3.25	2.24	7.28
at 1. *Standard error*			
I high	3.59	3.12	11.20
low	2.91	3.12	9.08
II high	3.59	2.56	9.19
low	2.91	2.56	7.45
III high	3.59	2.79	10.02
low	2.91	2.79	8.12
IV high	3.59	2.24	8.04
low	2.91	2.24	6.52

1. Explanation:

I. Car costs based on per diem procedure including 6-percent return on freight train cars.

II. Car costs based on per diem procedure including a 4-percent return on freight train cars.

III. Car costs were determined by the application of Rail Form A including a 6-percent return on freight train cars.

IV. Car costs were determined by the application of Fail Form A including a 4-percent return on freight train cars.

As indicated earlier, there were other studies of the detention time for the in-transit inspections which the respondents urge corroborate the costs shown in the above table. The results of such studies are shown below:

Study carriers (1)	Days detention (2)	Cost per day (3)	Total cost per inspection (4)
1. Eastern carriers	1.87	$2.76	$ 5.16
2. Northern Pacific	2.833	2.63	7.45
3. Great Northern—Great Falls	3.84	3.52	13.52
4. Great Northern—Spokane-Hill yard	3.87	3.52	13.62

The other item of cost determined by the respondents was switching. Respondents determined that the inspected grain

cars require on the average an additional 8.39 minutes of switching. This covers removal of the car from the inbound train to the inspection hold tracks, any additional switching on the hold tracks and finally the removal of the car to either the outbound train or to an industry switch. This study embraced 11 stations in the western district and is reflected in the following table:

Final results of the western carriers' switching studies

Railroad (1)	Station		Switch engine minutes per carload (4)
	City (2)	State (3)	
MILW	Aberdeen	S. Dak.	3.52
ATSF	Atchison	Kans.	4.20
CRIP	Belmond	Iowa	9.89
SP	Colton	Calif.	23.17
CNW	Huron	S. Dak.	3.29
IC	Iowa Falls	Iowa	6.28
BN	Lincoln	Nebr.	2.04
UP	Omaha-Council Bluffs	Nebr.-Iowa	5.50
MP	St. Joseph	Mo.	3.20
UP	Spokane	Wash.	14.99
BN	Superior	Nebr.	11.67
	Weighted average		8.39

The stations in the table were considered to be representative with respect to, (a) the number of railroads considered, (b) geographic dispersion, (c) dispersion among statistical strata, and (d) range in volume of traffic. The period of study was 7 consecutive days at each of the 11 stations. The engine minutes produced by the study for the actual movement of the inspected cars were increased to include nonproductive time charged to switching operations. The out-of-pocket costs per engine minute were developed for all of the 16 western railroad respondents combined through the application of a Rail Form A for the year 1969. The results are shown in the following table which also includes computations presented by the eastern railroads respondents and those made by studies submitted on behalf of individual respondents.

Cost of additional switching required for grain inspection

Carriers (1)	Added switch engine minutes (2)	Cost per engine minutes (3)	Total cost of switching (4)
1. Western railroads	8.39	$0.76070	$6.38
2. Eastern railroads	10.30	0.76206	7.85
3. Northern Pacific	4.906	0.803	3.94
4. Great Northern— Great Falls	12.65	0.6559	8.30
5. Great Northern— Spokane-Hill yard ..	9.60	0.6683	6.42

No attempt was made to determine the remaining items of cost associated with in-transit inspection on behalf of the western railroads as a group.[12]

Essentially, the respondents rely on their general study embracing the 16 western railroads and on the two cost items only—car delay and added switching. They do contend that the other costs are sustained and, to that extent, the costs shown are understated.

The primary figure relied upon by the respondents to show the cost of providing in-transit inspection is $16.52 and this figure is based, as stated, only on the expense categories of car detention and switching for the western railroads. This is composed of $10.14 as cost of car detention and $6.38 for cost of switching. The proposed charges range from $13.36 to $14.33. None of the respondents' show-

12. One of the respondents (Union Pacific Railroad) after an analysis of 956 inspected grain cars at three of its stations, Denver, Colo., Omaha and Lincoln, Nebr., concluded that its clerical costs amounted to 84 cents per car and that there were additional costs of 18.4 cents per car-mile for the backhaul required to move some cars to the inspection point. The total cost per car including a cost of $3.51 per day for each day the car was detained and $8.58 per switch ranged from $34.36 to $75.89. The study was based on data accumulated in 1968. One of the eastern railroad respondents also submitted a study which showed added clerical costs of 92 cents per car for the in-transit inspections.

ing as to detention time, switching minutes, or other costs makes reference to in-transit inspections in southern territory. The number of inspections in that territory are small and it is respondents' position that where they occur the same elements of car delay, car expense, and switching expense are involved.

The eastern railroad respondents have a currently effective charge for in-transit inspection of grain. It will be increased under the proposed schedules. These respondents undertook to develop the minimum costs incurred for holding cars for inspection, and their studies are discussed later in detail. Essentially, these costs include detention of cars, additional switching, and clerical expenses. The detention study in the East was confined to the three railroads on which the great majority of grain inspections are performed, Penn Central, C&O-B&O, and Norfolk and Western. The results indicate that the weighted average delay time due to grain inspection amounted to 44.91 hours per inspected car, which produces per car expense of $5.16. The switching studies encompassed 141 cars with an average switching time for inspection of 10.3 minutes per car more than is required on noninspected cars. At a unit-cost of $0.76206 per switch engine minute, this produced a cost of $7.85 per car. The clerical cost based on test observations at three inspection points (East St. Louis, Ill., Indianapolis, Ind., and Toledo, Ohio) show a cost of $0.92 per bill. The total of the three elements of expense amounts to $13.93 per car on the basis of a 4-percent return on investment after Federal income taxes. On the basis of a 6-percent return on car value, the total expense is shown to be $15.96 per car. The proposed charge is $14.33.

Other studies were made by individual respondents in connection with the car detention and additional switching and these differ from those shown in the study for the 16

western railroads. Respondents submit the individual studies for corroboration of their primary study. The results of such studies are shown in the tables set forth earlier, and the studies are described later in this report.

The respondents urge that the proposed charges, if they become effective, will not contravene the Commission's orders in the Docket No. 17000, Part 7, proceedings. The latter proceeding fixed the maximum rates for the movement of grain and grain products to, from, and within the West and there has been no vacation of that aspect of our outstanding orders. Respondents direct attention to the fact that the proposed charges will not apply to in-transit inspections where the underlying line-haul rates are at the Docket No. 17000, Part 7, level as increased by subsequently authorized general increases. It is their view that the currently effective rates on the vast majority of grain movements even when combined with the inspection charge proposed in the suspended tariffs do not exceed the Docket No. 17000, Part 7, level. Where they do, the proposed charge will not apply. Consequently, they submit that no violation of the outstanding orders can occur.

Anticipating that the protestants will make reference to a recent decision of the Commission, division 2, wherein proposed new transit charges (no separate charges were in effect for transit service), were found not shown to be just and reasonable, *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), the respondents urge that that decision is not applicable to the facts herein. There it was concluded, *inter alia*, that the railroads failed to show that their existing line-haul rates were not already sufficient to cover the service. Respondents urge that here they have demonstrated that the proposed charges are just and reasonable compared to the cost of providing the inspection

service, and that in the western district, the proposed charges, when combined with the existing line-haul rates, are less than the maximum prescribed rates on the same commodity. In the cited proceeding, it was also concluded that the proposed transit charges would likely divert traffic away from the railroads and thereby impair the railroads' net revenues. Such a determination is not possible on the evidence here, according to respondents. It is their view that competition with other modes for grain traffic will not be affected by the proposed charges.

Finally, the railroads refer to two issues raised during the hearing. The first is directed to a showing by the protestants that the proposed charges will result in violations of section 4 of the act. The respondents submit that any such violations are unintentional and will be corrected by appropriate tariff amendments when they become known. The second also relates to allegedly inadvertent changes in rates which one protestant submits results in unlawful preference. Respondents urge that there is no showing of any undue preference or prejudice of any location or shipper as to any traffic.

The supporting intervener, The Long Island Rail Road Company, advocates the same propositions advanced by the respondents. This party is particularly concerned with the practice of in-transit inspection in its relation to freight car supply. It suggests that the elimination of the car days for this inspection service would contribute more to the alleviation of the freight car shortage than the imposition of higher *per diem* charges on the terminating carrier. The intervener urges that the proposed charges are justified principally because of the benefits that will result in freight car supply and utilization.

Protestants.—Some 15 separate briefs were submitted by the protestants. Each of these parties request that the con-

sidered charges for in-transit inspection be found not shown to be just and reasonable. Their arguments, and evidence in support, is grouped into the following categories: (1) grain must be inspected and the only practical way for it to take place is while the shipment is in transit on the railroad, (2) the cost of the considered service is included in the line-haul rates and the proposed charge represents a surcharge not shown to be reasonable or justified, (3) car detention on grain inspected cars, where it occurs, is due to inefficient operating practices of railroads, (4) elimination of the in-transit inspection will not materially contribute to car supply, (5) the detention and car studies offered by respondents are basically deficient, and (6) the proposed charges, if they become effective, will result in violations of section 4 of the act.

Extensive evidence is presented by the protestants, particularly from the grain exchanges and the boards of trade, purporting to show that despite the change in the Federal statute an official inspection is required for the orderly marketing of grain. They also presented evidence showing the substantial movement of the grain loaded cars to inspection points for sampling and grading before the grain can be placed in trade channels for sale and distribution. The purpose of such evidence is to show that there is no other way for the preponderance of country grain elevators to secure official grades on the grain since they do not have automatic grain samplers. The grain market representatives also stress the necessity for an official inspection while the grain is still on the lines of the railroad in order to permit reconsignment of the shipments. Destination and origin sampling and inspection are impractical, according to the protestants. The former because the consignee would have difficulty in disposing of a shipment that failed to meet the grain required by his needs, and the latter because the cost of an original sampler precludes its installation at the majority of the country elevators.

The Secretary of Agriculture and most of the other protestants argue that the respondents have failed to sustain their burden of establishing that the proposed "additional charge" they seek to impose is reasonable and lawful in relation to the cost of performing the through service. Since the railroads, particularly those in the West and South, are presently not assessing a charge in their line-haul rates for the first stop for inspection, the protestants allege that the carriers may not now segregate the inspection service and assign to it a separate charge without first considering the entire through service of which the inspection is part and the compensation now being received for such service. The Secretary indicates on brief that he does not oppose the concept of a separately stated charge for the first stop for inspection but insists that the Commission must consider the revenue derived from the line-haul rates before it can determine the level of such a separate charge. A similar position is advocated by protestant National Grain and Feed Association. The latter submits that respondents have not sustained their burden of showing that proposed charges, applied in conjunction with the line-haul rates that permit the inspection, are just and reasonable. In support thereof, reliance is placed on *Transit Charges, Southern Territory, supra,* hereinafter more particularly considered.

There is also considerable evidence by protestants directed to the proposition that the car detention resulting from the in-transit inspection is due to respondents' inefficient operations. The presentation of the Fort Worth Grain Exchange, Fort Worth, Tex., and Far-Mar-Co., Inc., a company engaged in the handling, storage, and merchandising of grain with facilities in Colorado, Kansas, Nebraska, and Missouri, is representative of the showing in this area. The Fort Worth Exchange maintains that the Fort Worth yard of the Rock Island, one of the railroad yards in respondents' study, has antiquated facilities and an analysis of the serv-

ice rendered shows that too many cars designated for inspection are held in this yard. The delays for inspection are allegedly attributable to the inability of this respondent to perform the service. Similarly, Far-Mar-Co., Inc., contends that one of the respondents serving the inspection point of Hutchinson, Kans., regularly delays the movement of its cars following inspection until the second day after receipt of billing instructions. Almost without exception, the protestants urge that since the grain trade will continue to require the in-transit inspection there is little hope for enlarging the car supply under the proposed charges. If these charges become effective, the result will be an increase in respondents' revenue and the inspection delays that hinder a more efficient use of railroad cars will continue according to the protestants.

These parties also assail the various studies submitted by the railroads. Led by the Board of Trade of the City of Chicago and beginning with the profitability analyses, they uniformly challenge the reliability of all the studies presented. The use of the waybill statistics to measure the decrease in profitability for the grain movement is attacked because of the changes in the transportation of grain by railroad since 1966. The increased use of the heavier loading covered hopper cars, multiple-car movements, and unit trains in the past 4 years assertedly makes respondents' comparisons invalid. However, the principal opposition is directed to the car detention and switching studies.

Protestants contend that the basic premise of the detention study, namely, that any significant differences between the detention time for inspected cars and the control group of uninspected cars at any given station could be properly attributed to the service of inspection, is not established. Initially, as indicated, the respondents treated the inspected group of cars and the control group as if they were directly comparable and equal in all respects except for differences

that may be attributable to inspection. There was criticism during the hearing by protestants as to whether the inspected cars and uninspected cars differ importantly in the proportions in which they fall into different types of movement such as terminating, through, and transfer cars. Any difference could seriously bias the study. As indicated earlier, an adjustment was made to take care of this problem (the so-called like-vs.-like correction). Protestants do not accept the adjustment. They urge that for each of the 18 study stations there are five types of movements where inspected and uninspected cars would potentially be compared on a like-with-like basis or a total of 90 potential comparisons. Appendix B to the report shows protestants' computation of numbers of cars, inspected and uninspected, in the five types of movement for the 18 study stations. Of these 90 situations in which comparisons could be made, there are assertedly only 27 instances in which both inspected and uninspected cars occur and, even there, protestants submit that there are numerous instances where the number of inspected or uninspected cars is so small that no meaningful conclusion could be drawn from the happenstance of the detention time on such a small number of cars. On a total of 3,387 cars in the study, protestants contend that only 1,000 have a like-with-like comparison.

The second asserted basic error in the carriers' detention study to which protestants refer is that it was designed to include a large portion of time which they submit is not attributable to in-transit inspection. It is their view that the preponderance of the inspected cars in the study were at the particular study stations because they were to be delivered to industries at that point. The study, by definition, included the time the car spent at the study stations until it departed in a switch run to the industry which included all the time the cars spent on constructive placement because the industries were unable to receive additional

cars. Protestants submit that the constructive placement time should not be included in the time charged to inspection since the industry could not receive the cars regardless of whether they have been inspected or not.

Other deficiencies in the detention study are charged by protestant. These include the use of estimates at certain of the stations for delivery of uninspected cars; the elimination from the study of certain uninspected cars which were not representative and produced unduly long detention times; the failure to offset the detention time with the time the car would be held for sampling at origin; and the method of expanding the sample after the data was developed. Protestants did not attempt to restate the results because it is their view that the described defects cannot be cured by a restatement and they ask us to conclude that the extensive study has failed to produce a reliable and accurate estimate of the detention time.

Much criticism is also offered of the switching study submitted by the 16 western railroad respondents. There are allegedly three principal deficiencies in the 11-station study which make it unacceptable: (1) the 1-week period used is not a representative period, (2) the study assigned switching time to gain cars for inspection that should not be attributed to such cars, and (3) the assignment of too much nonproduction time to the inspected cars. Here, as in the detention study, protestants assert that the switching data submitted was so basically deficient it was impossible to make corrective adjustments and restate the switching costs. The other studies offered by the individual western railroads and by the eastern railroads were considered similarly deficient by protestants.

Finally, protestants argue that the assessment of the proposed charges will result in violations of the act. Primarily, reliance is placed on violations with respect to the provi-

sions of section 4 but there are also allegations that the additional charges, if they become effective, will produce unlawful preference and prejudice. As stated, the respondents do not propose to make the charges applicable where the line-haul rates for the movement of the grain when coupled with the said charge result in transportation charges that exceed the Docket No. 17000, Part 7, maximum rates as increased. This method of publication has resulted in departures from the long- and short-haul provisions of the section. While the respondents have indicated a willingness to correct all the violations brought to their attention, the protestants submit that there are numerous instances of section 4 violations and it is the obligation of the railroads to propose rates and charges which do not result in violations of the act.

Some of the protestants urge that the rate differences resulting from the elimination of the assessment of the charge where the applicable line-haul rates are at the Docket No. 17000, Part 7, level also cause unlawful preference and prejudice. The Public Service Commission, State of North Dakota, contends that the assessment of the charge for inspection on shipments of grain originating in North Dakota, which was approved in *Grand Forks Cham. of Com.* v. *Great Northern Ry. Co.*, 321 I.C.C. 356, results in undue prejudice to the North Dakota grain shippers and undue preference of other shippers of grain not paying the charge. This party asks the Commission to make the charge uniform throughout the western district. If the proposed charges are found not to be just and reasonable, we are asked to conclude herein that the charges applied in North Dakota are unduly prejudicial.

Discussion and Conclusions

This proceeding presents complex factual and legal issues and there is intense controversy. The issue of the lawful-

ness of any part of the unique pricing system applicable to the railroad movement of grain is always a perplexing task. Here the problem is further complicated by the inclusion of the equally difficult question relating to the national shortage of railroad freight cars.

It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a separate charge for this service in the East. A substantial increase in those charges will result, however, if the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district. Except where indicated otherwise, the discussion relates to the proposed charges in connection with the railroad movement of grain in the West.

We consider, initially, the record in relation to the justness and reasonableness of the proposed charges, without regard to the impact of such charges on the availability of railroad freight cars. We have resolved two preliminary questions. First, the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality. Second, it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad.

While it is conceded by protestants that in-transit inspection is not mandatory, they submit that it is the only logical and practical way for the sampling and grading to take

place. Even if we accept that proposition, it does not constitute a sound basis for requiring the railroads to continue making the service available. The in-transit inspection is an accessorial service. There is no mandate either in the act or in the Commission's decisions that compel the railroads to continue to provide the inspection service without separate charge merely because such a service is a convenience to shippers or, stated otherwise, provides a logical and practical way for buyers and sellers to be assured of the grade or quality of grain in a particular shipment.

The significant aspect is, of course, whether the establishment of an additional charge for a service that has been provided at the line-haul rates is just and reasonable under the circumstances shown on this record. Protestants submit that it is not since respondents have failed to establish that the combination of the line-haul rate and the proposed charge does not exceed a just and reasonable level for the total services provided. Such an omission is assertedly critical in view of our decision in *Transit Charges, Southern Territory, supra.* Particular reference is made to the following excerpt from that decision (332 I.C.C. at 683 and 684):

> • • • The reasonableness of the proposal cannot be properly determined here without reference to, and consideration of, the line-haul rates, the services furnished thereunder, and the cost thereof. Clearly, in the circumstances presented, the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. Cf. *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943); *Unloading Lumber at New York Harbor,* 256 I.C.C. 463 (1943); and see *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 652 (1954). While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if

indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed. Respondents have not endeavored to base their action here on any facts bearing upon the revenue-cost relationship of the complete operation. Nor have they indicated the effect of the proposal either overall or with respect to the movement of the specific commodities involved.

The instant proceeding is distinguishable from the cited proceeding in two important respects. As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without "reference to the line-haul rates, the services furnished thereunder, and the cost thereof," effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court of the United States, for the Southern District of Ohio, western division, *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, ... F.Supp. ... (decided January 12, 1970), while sustaining the Commission on other grounds, indicated that the burden of proof required of the respondent railroads was erroneous.

However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here. That difference is that the line-haul rate applicable to any movement of grain within the West when

coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products, supra.* Nor are we influenced to reach a contrary conclusion by protestants reference to the fact that the rate level was fixed more than 30 years ago and conditions and circumstances relating to the railroad transportation of grain have changed in the interim. There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products,* 298 I.C.C. 261 (1956), the Commission, while vacating prior orders in Docket No. 17000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.,* 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities.

One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra,* was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Similar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added. Grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available.

Even though the combined line-haul rate and proposed charge does not exceed the prescribed maximum level, it is still encumbent on the Commission to determine if the separate charge is reasonable when related to the specific service for which it is to be assessed. As indicated, extensive studies are offered to support the claim that it is.

The detention studies.—The key evidence with respect to an ascertainment of the cost factor associated with in-transit inspection and, as later considered, in connection with efficient car utilization, is the analyses of the time required to perform the indicated service. The principal study is the joint one presented by the 16 western railroads. The purpose of this study is to determine how much delay time is caused by the in-transit inspection on the railroad's track. The question can be answered satisfactorily by one of two standard methods; one requires a judgment of the inspected car movements, and the other requires the use of control groups. Both the judgment basis and control group may be used with probability sampling.

To eliminate judgments about detailed traffic elements and because of administrative problems in obtaining the

required data, the respondent carriers did not use the judgment basis. They used the control group for measuring the indicated delay. Control groups have been extensively used in medicine, industry and Government to determine cause and effect relationships. The two main requirements for an acceptable study are the use of adequate sampling methods and the use of a control group which adequately reflects likeness for those characteristics which may significantly affect the results.

The probability sample of stations for the 1968 car detention study is adequate for the selection of stations. There were 217 inspection stations in the frame covering the 16 western railroads. These 217 stations were stratified into 9 groupings or strata based upon estimated delay time for each of the 217 stations. A simple random sample of two was drawn from each stratum to yield a total of 18 stations. From each selected station a random sample of approximately 100 cars was selected from each of the two categories of inspected and uninspected cars for the year 1968. A total of 3,387 cars were randomly selected for study from which 12 had no data on handling time. Thus, each of the 217 stations had a known chance of being selected as well as each of the cars at the selected stations. This method of selecting study stations is called "stratified random cluster sampling." There was some shifting of some of the frame stations from the original stratified groupings, but this procedure is acceptable and does not invalidate the study since the random selection was done subsequent to this shifting. The delay times for each of the 18 stations were properly weighted and combined appropriately for the method of sampling used. The estimate for delay time developed from this study was 89 hours.

However, after the criticism by protestants described earlier, as to whether the inspected and uninspected cars differ in the proportions in which they fall into different

types of movement, adjustments were made to the data which resulted in a reduction to 73 hours of car delay. Basically the correction or adjustment formula (like versus like) takes care of the protestants' objection. This adjustment to the respondents data is equivalent to the use of the following formula. Under the formula the average delay time for a station equals the sum of the following four items:

FORMULA FOR DEVELOPING AVERAGE DELAY TIME DUE TO IN-TRANSIT GRAIN INSPECTION[13]

Average delay time for a station equals the sum of 1, 2, 3, and 4:

1. Average handling time for inspected cars.

2. Minus (proportion of inspected cars delivered at station) multiplied by (average handling time for uninspected cars delivered at station).

3. Minus (the allocated[14] proportion of inspected cars moving on through train) multiplied by (average handling time for uninspected cars moving on through train without set out).

4. Minus (the allocated[15] proportion of inspected cars moving on through train) multiplied by (average handling time for uninspected cars moving on through train with set out).[16]

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13. When cars are referred to this will always mean grain cars. Proportion refers to a percentage or ratio of cars in one category to another category.

14. This allocation based on the application of the ratio of uninspected cars in through trains without set outs to uninspected cars in all through trains.

15. This allocation based on the application of the ratio of uninspected cars in through trains with set outs to uninspected cars in all through trains.

16. Set out refers only to the setting out of a grain car by a train.

After the average delay time is computed for each of the 18 stations, they are weighted and combined to obtain average delay time due to inspection.

The purpose of this formula is to obtain comparisons between like movements for inspected and uninspected cars. This is done by the use of control groups obtaining like comparisons between pairs of groups of inspected and uninspected cars, made comparable by type of car, time, station, railroad, and type of movement. The types of movements used are grain cars terminating at the study station, grain cars in through movements but set out at the study station, and cars moving in through train movements without being set out.

To eliminate bias due to differing numbers of inspected and uninspected cars at a study station for each of these three types of movements, the formula does the following. Using only the sample data for the study stations and without use of subjective judgment, it automatically allocates the sample data following these basic precepts:

1. The *inspected* cars, if there were no in-transit grain inspection, would have the same proportions of deliveries and through moves that *inspected* cars now have at the study station.

2. The through cars being *inspected* would move on a through train without set out with as much likelihood as an uninspected car at the study station.

These two precepts or rules appear to be relatively realistic and appropriate for the actual situations at the study stations. Even if they may not conform exactly to the situation at a particular station, it seems reasonable that they should conform on the average to the situations at all the study stations combined.

For example, from the study at Fremont, there are 41 grain cars in a through movement that were set out for grain inspection but there were no like set outs for uninspected grain cars. Also, there were 97 uninspected grain cars that moved through on a fast train without set outs. (It is theoretically impossible for an inspected car to move on fast train without set outs.) Therefore, it is reasonable to expect any uninspected cars in the future to move on a fast train through Fremont. There is also a possibility that if a grain car in a through movement were not inspected at Fremont, it would be short-hauled by passing Fremont to its final destination. But this additional delay time due to backhauling for in-transit grain inspection is not developed by the formula. (See appendix B.)

Even if the five types of movement, referred to by protestants, were used, the average delay time would not change significantly. This is shown in the table set forth in appendix C. The values shown in column 8 of the table indicate the differences between the respondents' figures for delay time and the delay time for the individual categories. These differences indicate no trend in either direction and show in many cases close agreement. Out of 27 comparisons there are 15 which are within 5 hours differences.

Thus, the respondents' formula appears to be a valid and appropriate basis for determining the delay time.

Protestants claim that constructive placement time should have been excluded from the study both for terminating inspected cars and terminating uninspected cars. To the extent that both groups of cars had equal amounts of constructive place time included in their total handling times, constructive placement time is eliminated from the results. On this record it is not possible to state whether inspected cars have more constructive placement time than the uninspected cars. Knowledge about the constructive placement time would be pertinent, but it is not necessary

for the establishment of the validity of the car detention study. Five of the study stations (Clinton, Fremont, Lewiston, Little Rock, and Superior) had zero number of uninspected cars terminating there. Coordinators for the grain inspection made estimates of handling time of uninspected cars terminating at these stations. Protestants claim that these estimates were substantially in error. It is their view that 79 hours should be used instead of the coordinator's average estimate of 26 or 27 hours. The 79 hour figure is based upon an unweighted average of the uninspected cars' delay time at the other stations' terminating cars on the railroad's line. This figure, 79 hours, should not be substituted for the estimates of the coordinators. Protestants' estimate is heavily based on the experience of export grain at Seattle. The cars terminating at these five stations do not contain grain for export. The estimates of the coordinators are considered more acceptable.

However, it is apparent that the study coordinators excluded all constructive placement time from their estimates of handling time for uninspected cars terminated at Clinton, Fremont, Lewiston, Little Rock, and Superior. It is not determinable whether there was a significant amount of constructive placement for these stations. Allowing the total average handling time for these stations to be increased 50 percent would increase the overall like-vs.-like adjustment by less than 5 hours. A reduction in the average delay time from 78 hours would take care of this bias.

There are a number of other alleged deficiencies in the detention study which are referred to and considered in appendix D to the report. They are considered negligible in their impact on the accuracy and reliability of the study. Respondents' detention study is acceptable if estimated average car delay time is reduced to 73 hours from the original figure of 78 hours. The standard error for the delay time is about 8 hours. The study is a probability sample which basically follows the sampling guidelines used

in prior proceedings before the Commission. The respondents methodology of using control groups constitutes a statistically valid, credible, and appropriate method for estimating delay time.

There are, as indicated, other studies of record showing the detention time for the in-transit inspection. This service, at the line-haul rates, was eliminated in the East several years ago, so the issue now before us with respect to the eastern railroad respondents is whether the proposed charge is justified from a cost standpoint. These respondents undertook to develop the cost directly attributable to the holding of cars for grain inspection. The elements of expense primarily relied upon were the detention of the cars, the additional switching and the clerical expense. The great majority of grain inspections in the East are performed on the lines of the C&O-B&O, Norfolk and Western, and Penn Central; and the development of costs was confined to these lines.

These roads gathered sample data from yards providing grain inspection services by examination of all grain cars entering the yard on particular days. Different time periods were used, but all of the sample periods were designed to be of sufficient size to permit statistically valid analyses.

The difference in "yard throughput" (putting a car through the yard) between inspected and noninspected cars was determined on a conservative basis. The assignable time began with the entrance of a car into the yard on an inbound train and ended either with placement of the car on the consignee's siding, or placement on another train in the case of a nonterminal movement. On this basis, the weighted average difference in car throughput between inspected and noninspected cars amounts to 44.91 hours per car. The difference in car throughput varied from yard to yard and from railroad to railroad, but in every yard where statistical testing was possible there existed a strong statistical significance in the test for difference of means.

Every yard tested showed a positive mean difference between inspected car throughput and noninspected car throughput. This indicates both that the detention figures can be used with a high degree of confidence and that dollarization of such detention time is feasible. As shown in a table set forth earlier, the total detention cost to the eastern railroads for inspection amounted to $5.16.

Respondent Burlington Northern[17] conducted seven detention studies entirely separate from the 16-carrier 1968 study previously considered. Five were made at former Northern Pacific terminals and two at former Great Northern stations. The Northern Pacific detention study embraced the first 10 months of 1969. For 1,530 inspected cars in this study, the weighted average detention time per car was 102.4 hours. The weighted average detention time per car of 1,112 uninspected cars was only 34.4 hours. Inspected cars, thus, remained at the inspection points an average of 68 hours longer than uninspected cars. That is the detention time shown in the earlier table where the total inspection cost is computed at $7.45. The results at the Great Northern stations show an average detention time per car in a sample of 47 grain cars held at Spokane, Wash., for inspection during the period December 9-15, 1969, to be 109.1 hours while, on the cars not held for inspection during the study period, the average detention time was only 16.2, for a difference of 92.9 hours. At Great Falls, Mont., a similar study for the period June 25-July 1, 1969, shows that cars held for inspection remained an average of 92.3 hours longer than other cars not held for inspection and disposition orders. The car detention costs for this carrier are shown in the indicated table as $13.62 and $13.52, respectively.

It is unnecessary to consider the Burlington Northern studies in greater detail. They are offered by the western

17. The studies were instituted by the predecessor companies before merger.

railroad respondents as corrobative to the main or primary detention study of the 16 western railroads. We consider the 1968 study of the 16 western railroads as presenting reliable results with respect to car detention attributable to the in-transit inspection in the West.

The switching studies.—The basic study is the one offered on behalf of the 16 western railroad respondents. As earlier shown, the study was based on an analyses of the 11 stations and resulted in a final average switching time of 8.39 minutes per car. The switching study stations were chosen originally from the 18 stations used to determine the car detention time. However, because of problems associated with the 1-week study (for example, Fremont, Nebr., and Stockton, Calif., had no grain carloads during study week), a number of the stations were eliminated and others substituted. As a result, the sample of stations on the switching is, in part, based on a judgment selection. The comparative volume at the study stations is shown in the following table.

Selected stations and comparative volumes

Line No.	Railroad and study station (1)		1968 volume of cars (loaded and empty)		
			Year (2)	Average week (3)	Study week (4)
1	MILW	Aberdeen, S. Dak.	454,296	8,736	9,023
2	ATSF	Atchison, Kans.	14,033	270	336
3	CRIP	Belmond, Iowa[2]	2,919	56	197
4	SP	Colton, Calif.	[1]248,564	4,780	4,669
5	CNW	Huron, S. Dak.	92,477	1,778	1,306
6	IC	Iowa Falls, Iowa	[1]172,308	3,314	3,310
7	BN	Lincoln, Nebr.	[1]1,731,151	33,291	[3]37,236
8	UP	Omaha-Council Bluffs	463,655	8,916	[3]9,410
9	MP	St. Joseph, Mo.	155,516	2,991	2,075
10	UP	Spokane, Wash.	129,274	2,486	2,934
11	BN	Superior, Nebr.	9,314	179	[3]106

1. 1969 annual count of cars handled.
2. Study week was June 30-July 6, 1970.
3. Study week in April 1970.

The study period selected was 1 week in November of 1969, but three of the stations were studied during a week in April 1970, and one in July 1970 because of difficulties encountered in November of 1969. The stations studied were well distributed geographically and they constitute a fair representation of the stations originally in the frame of the 217 stations used in the detention study.

Protestants' criticism of the switching study was concerned chiefly with the adequacy of the sample of the traffic and the high nonproductive additive at a few of the stations studied. Corrections in the study as a result of the criticism decreased the average switching minutes from the 8.74 minutes in the original study. The use of 1 week for a study period has been accepted as appropriate in prior switching studies made by the railroads and conforms to procedures suggested by the Cost Section of the Commission's Bureau of Accounts. The average switching time of 8.39 minutes per car is acceptable as a measure of the time required to move the grain cars to and from the inspection tracks.

The eastern railroad respondents, having in mind the desirability of achieving a geographical spread with variation among points selected as to volume and effort required, presented switching studies at Toledo, Ohio, by the C&O-B&O, at Indianapolis, Ind., by Penn Central, and at East St. Louis, Ill., by the Norfolk and Western. The C&O-B&O study was conducted during the period November 4-6, 1969. B&O grain inspection at Toledo is performed at the Rossford yard, and, in a simple operation involving the switching of inspected cars to a classification track used for that purpose. The time required for the 69 cars moved to the inspected track during the study period averaged 7.4 minutes switching time per car, including an additive of 22.4 percent for nonproductive time. The operation at the Walbridge yard of the C&O at Toledo is more complicated.

Grain inspection at this yard must be performed on a separate track located across the main lines. During the study period the great majority of the traffic moved via Rossford yard and no attempt was made to compute the switching time for inspection at Walbridge.

Penn Central conducted a 3-day study at Indianapolis. Inbound carloads of grain for inspection at Indianapolis arrive either at Big 4 Yard, 11 miles west of Indianapolis, or at Hawthorne yard, in the southwest corner of Indianapolis. Inspections are made either at Hawthorne yard or at Hill yard, just south of Hawthorne yard. Carloads of grain for inspection arriving at Big 4 Yard for local delivery at Indianapolis are placed, along with other traffic, in a transfer cut to Hill yard which involves a movement of approximately 17 miles. Upon arrival at Hill yard, the cut is classified and the inspection cars are placed on a designated class track for further movement. After classification, noninspected cars are delivered directly to the elevator. The inspected cars must be moved from the class track to the inspection tracks, and then returned to the switching lead for a reclassification and further delivery. The only switching time charged at Hill yard for the inspected cars was for the movement from the classification tracks to the inspection track and return. Cars arriving at the Hawthorne yard are first classified. The grain cars to be inspected are moved to the inspection tracks, returned and reclassified for further delivery. The added switching time for the movement between the classification tracks and the inspection tracks at Hawthorne yard is attributable solely to placing cars for inspection, and this was the only switch engine time included in the study. The extra switching time required was 6.1 minutes per car at Hill yard, and 5.4 minutes per car at Hawthorne yard. In 1968, Indianapolis had about 1,500 inspections, or 5 percent of the Penn Central's

total. In 1969, Indianapolis had about 1,900 inspections, or about 10 percent of this carrier's total inspections.

The Norfolk and Western 3-day switching study at East St. Louis involved a more extensive movement than those at either Indianapolis or Toledo. At East St. Louis, the uninspected cars arrive at Middle Yard, receive one classification switch, and are then pulled for local delivery or for road train movement beyond. The cars to be inspected are first placed on a designated hold track at Middle yard for accumulation and subsequent transfer to Lower yard. The transfer movement to Lower yard involves the movement of the engine light to the Middle yard. In addition, switching service is required to effect placement on Lower yard inspection tracks, pulling from Lower yard track, and another transfer movement from Lower yard to Middle yard, the latter being normally preceded by the light movement of the transfer engine to Lower yard for this purpose. A further classification switch at Middle yard is then necessary. The extra classification switching at Middle yard came to 2.90 minutes per car, including nonproductive time. The movement from Middle to Lower yard averaged 5.35 minutes per car, and the return movement averaged 1.91 minutes per car, totaling 7.26 minutes. A conservative method of combining the trips in each direction produced 6.22 minutes per car and this figure was used. The total time for placing and pulling cars at Lower yard averaged 3.34 minutes per car. The addition of the nonproductive factor of 28.04 percent brought the average minutes per car inspected to 12.24, exclusive of the extra classification switching time at Middle yard. Adding this latter time of 2.90 minutes brought the total average time attributable to extra switching for grain inspection to 15.14 minutes per car. The annual volume of inspections on the Norfolk and Western at East St. Louis of 2,853 cars represents almost 10 percent of the carrier's total system inspections.

The three switching studies of the eastern railroads encompassed 141 cars, with an average switching time for inspection of 10.3 minutes per car over and above the time required on cars not held for inspection. At a unit-cost of $0.76206 per switch engine minute, this produced a cost of $7.85 per car.

Test observations at East St. Louis, Toledo and Indianapolis developed an average of 11.16 minutes of clerical effort per bill rendered. At the clerical wage rate in effect during 1969, this produces a cost of $0.92 per bill. With the inclusion of the car detention cost of $5.16, the total of the three elements of expense amounts to $13.93 per car on the basis of a 4-percent return on investments after Federal income taxes, and $15.96 per car on the basis of a 6-percent return on car value.

The switching studies by the Burlington Northern (Northern Pacific and Great Northern), like their car detention studies, are submitted to confirm the showing in the 16-carrier study. The studies by the former Northern Pacific were made at the three principal hold points at which the proposed charges would apply, Minneapolis and Duluth, Minn., and Spokane, Wash. Each study embraced 7 straight days of operations in December of 1969. The average chargeable switching minutes per car held for inspection were developed for each of the three study terminals. A weighted average of 4.906 switch engine minutes per car for every grain hold car embraced in the studies was developed. The average was weighted heavily for the experience at Spokane where grain cars held for inspection totaled 340 compared with 66 at Minneapolis and 34 at Duluth. Switching expenses were then determined by applying the 1968 out-of-pocket costs per switch engine minute to the 4.90 switching minutes per car charges to grain inspection, and the expenses were adjusted to the 1969 level. The former

Great Northern conducted its studies at the Spokane-Hill yard and at Great Falls. The only switching time counted was that which would not have been incurred if the grain cars counted (356 at Spokane-Hill yard and 51 at Great Falls) had not been held for inspection and disposition orders. Total additional switch engine time required to switch the grain hold cars at Spokane-Hill yard was 9.60 minutes and the total additional time at Great Falls was 12.65 switch engine minutes. To these minutes, the Great Northern applied 1969 costs based on normalized maintenance and system repair and depreciation rates for the class of locomotives operated at the study terminals in 1969 to the locomotive unit-miles operated by switch engines at these terminals in the same year. Calculations were also made for wage, switching fuel, lubricant, supplies, and enginehouse expenses directly chargeable to the study terminals in 1969 but no direct costs for supervision, general overheads or State taxes were factored. Nor was any return on investment in road property included in the switching costs.

In the table set out below, the incremental cost of switching, per grain inspection, on all study carriers is shown.

Line No. (1)	Study carriers (2)	Incremental cost of switching per grain inspection (3)
1	Western	$6.38
2	Eastern	7.85
3	NP	3.94
4	GN—Great Falls	8.30
5	GN—Spokane-Hill yard	6.42

An extensive discussion of the various aspects of the different car detention and switching studies has been considered essential because the proposed charges in the West represent an innovation that will have some effect on the

grain movement, at least in the immediate future. The opposition to these charges, particularly by the grain markets, is vigorous and we believe our careful scrutiny of the costs incurred by the railroads in rendering this in-transit service was necessary. This review has persuaded us that the 16 carrier studies represent a sound and valid appraisal of the expenses sustained and we are convinced by these analyses that, in the light of the services that are rendered, the proposed charges are just and reasonable. This is equally true for the eastern railroad respondents where the problems are less complicated since there has been a separate charge for this inspection service for several years, and the proposed charges represent increases. We believe that these increases have been shown to be justified based on costs. A comparison of the costs and charges is shown in appendix E. Adjustments were made to reflect the reduction in car detention time (3.04 days) considered more appropriate than the time (3.25 days) computed in the 16-carrier study. It should also be stressed that several elements of cost are not included in the computations, as indicated in the appendix table. In addition, the record here is persuasive that each carload of grain in the West receives approximately 1.5 in-transit uninspected services. Since all computations herein are predicated on a single inspection, the resulting costs are understated.

There is no significant opposition to the application of the proposed inspection charges in the South. The cost factors shown for both the western and eastern railroads are to a large degree shared by the southern railroads in performing in-transit inspection. Because of this general cost parity, the very limited use of the inspection service in the South, and the absence of opposition, our findings herein embrace the complete proposal under consideration.

Our conclusions are not invalidated by the fact that application of the proposed charges will on particular movements

of grain result in total charges that contravene the provisions of section 4 of the act. The respondents state that they attempted to avoid such violations in establishing the proposed charges, and any that still exist are due to lack of knowledge. The grain rate structure is complex and so-called fourth-section violations could result from the initial establishment of the inspection charges. During the suspension period the respondents were supplied with a number of potential violations. They advise that tariff amendments will be filed to clear every known departure from the fourth section, before the proposed charges become effective.

Allegations with respect to undue preference and prejudice raised by the North Dakota interests require little additional discussion. The establishment of the proposed charges will eliminate the discrimination, if any, resulting from the assessment of inspection charges at North Dakota points, and the failure to assess similar charges at other points in the West. Also, there is no convincing evidence to substantiate the protestants' allegation that rail inefficiency is responsible for increased car detention.

While we have concluded that the proposed charges are shown to be just and reasonable on the usual basis of review, it is encumbent to consider also the effect of such charges on the national shortage of railroad freight cars. It is not necessary to make specific findings that such a shortage, which at particular periods such as during the grain harvest is critical, actually exists. Shortages have been an annual occurrence for a number of years and there are numerous proceedings before the Commission which establish the fact. The shortage is also accepted as fact by the parties to this record who, as indicated, have argued at length the pros and cons of the effect of the proposed charges on car utilization and car supply.

Respondents state that the overriding consideration in the review of the proposed charges must be increased car utilization. This was the primary objective of the western railroads in proposing the inspection charge and is the apparent reason for the failure of a number of the larger grain and related industries to appear as protestants in this proceeding. The growth of the alternative sampling procedures indicates some progress away from the in-transit inspection. Because of the economic impact of the charges, the approval given herein should accelerate the use of the origin samplers. It is clear from the detention studies that the in-transit inspection results in an unwarranted loss of car availability, and the elimination of the service, or any significant portion of it, will materially increase car utilization. Respondents have introduced evidence showing that the car-days delay due to inspection in 1969 in the West alone amounted to more than 1.5 million. On the basis that a railroad freight car has 261 active car-days per year,[18] the respondents contend that their railroad freight car fleet is reduced by some 6,000 cars because of the delay due to grain inspection. The figures are computed on an average car detention per inspection of 3.25 days, and the total figure may be somewhat inflated. However, there is no question but what the elimination of the in-transit inspection would materially increase the number of available freight cars by several thousand annually.

Another matter not to be ignored is the loss of revenue caused by the reduced car supply due to grain inspections. Western railroads estimate this at more than $10 million annually. The figures supporting this estimate are set forth in appendix A.

Summary.—In the interest of a better understanding of

18. Derived from a publication of the Cost Section of the Commission's Bureau of Accounts.

this complex proceeding we restate, in summary, the chief subsidiary findings that lead us to the ultimate conclusion that the considered schedules are just and reasonable.

1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.

2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

Accordingly, we find that the proposed new or increased in-transit charges for inspection of grain at various points in the United States are just and reasonable and otherwise lawful.

It is ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission division 2.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX A

TABLE 5.—*Respondents' showing of the revenue loss caused by reduced car supply due to grain car inspections*

Line No.	Item	Total amount	
	(1)	1968 (2)	1969 (3)
1	Count of inspections	464,164	488,601
2	Delay time (days)	3.25	3
3	Car days for the year	1,508,726	1,588,157
4	Active days per year	261	261
5	Car lost	5,781	6,085
6	Average trips per year	16.7	16.7
7	Lost car trips (miles)	96,543	101,620
8	Average revenue per car	$344	$344
9	Revenue loss	$33,210,792	$34,957,280
10	Reduction in out-of-pocket costs.	$22,289,122	$23,461,262
11	Loss in contribution to overhead.	$10,921,670	$11,496,018
12	One standard error would reduce 157,074 days from line 3.	.....	.....
13	Loss in contribution to overhead.	$9,784,286	$10,358,634

Counts of cars by type of movement

	TN		TS		IF		IR		DH		DI		No data		Total[1]	
	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected	Inspected	Uninspected
Spokane	....	1	84	90	....	....	....	....	16	6	....	3	....	....	100	100
Chicago	....	....	....	....	9	45	....	....	9	5	64	34	1	2	82	84
Fremont	....	97	41	....	....	....	....	....	59	(–)	....	....	....	....	100	97
Alton	....	77	6	....	....	....	....	....	85	(3)	....	....	....	4	91	80
Atchison	....	79	....	....	....	....	....	....	....	....	100	17	....	....	100	96
Clinton	....	82	....	....	....	....	....	....	97	(–)	....	....	....	....	97	82
Belmond	....	109	9	....	....	....	....	....	....	....	82	1	....	....	91	110
Seattle	....	....	34	....	2	2	....	....	52	65	11	49	....	....	99	116
Wichita	....	87	29	2	....	....	....	....	....	1	64	11	....	....	93	101
Lewiston	....	....	95	100	....	....	....	....	....	....	4	(–)	....	....	99	100
Superior	....	....	13	....	72	100	....	....	13	(–)	....	....	....	....	98	100
Los Angeles	....	....	21	80	....	....	....	....	30	4	47	13	1	2	98	97
Aberdeen	....	17	96	83	....	....	....	....	....	....	....	....	....	....	96	100
Huron	....	....	89	112	....	....	....	....	....	....	....	....	....	....	89	112
Little Rock	....	11	9	83	5	....	....	....	47	(–)	23	(–)	....	2	84	94
Fort Worth	....	41	26	48	1	6	....	....	9	3	50	4	....	....	86	102
Houston	....	....	....	20	....	....	....	....	....	....	88	80	....	....	88	100
Stockton	....	20	....	2	2	60	....	....	....	....	22	19	....	....	24	101

[1] Eliminates no data cars.

TN—Through movement on reporting road, no set out.
TS—Through movement with a set out.
IF—Interline forwarded to connecting carrier.
IR—Interline received from connecting carrier.
DH—Delivered on line of reporting road.
DI—Delivered by interchange connection.

NOTE: Parentheses ( ) indicates cases where estimates of handling time were created by judgment rather than from the data collected.

APPENDIX C

Differences between two kinds of like-v.-like adjustments in the western car detention study

(all times are in hours)

Line No.	Station	Delay time after respondents' like-v.-like adjustments	Delay times for individual categories of cars[1]				Differences between respondents' delay time and the within-car-category delay times (column (3) minus column (4) or (5) or (6) or (7), as appropriate)
			TS	IF	DH	DI	
(1)	(2)	(3)	(4)	(5)	(6)	(7)	(8)
1	Spokane	84	87	.....	51	.....	−3, +33
2	Chicago	63	.....	78	63	61	−15, 0, +2
3	Fremont	65	.....	.....	.....	.....	.....
4	Alton	54	.....	.....	.....	.....	.....
5	Atchison	76	.....	.....	.....	73	+3
6	Clinton	107	.....	.....	.....	.....	.....
7	Belmond	64	.....	.....	.....	61	+3
8	Seattle	114	.....	145	82	98	−31, +32, +16
9	Wichita	44	40	.....	.....	39	+4, +5
10	Lewiston	85	86	.....	.....	.....	−1
11	Superior	59	.....	53	.....	.....	+6
12	Los Angeles	84	92	.....	82	77	−8, +2, +7
13	Aberdeen	69	64	.....	.....	.....	+5
14	Huron	51	51	.....	.....	.....	0
15	Little Rock	42	68	.....	.....	.....	−26
16	Fort Worth	104	85	107	101	118	+19, −3, +3, −14
17	Houston	105	.....	.....	.....	105	0
18	Stockton	43	.....	98	.....	39	−55, +4

[1] TS—Through movement with an intertrain switch.
IF—Interline forward to connecting carrier.
DH—Delivered on the line of the reporting road.
DI—Delivered by interchange connection.

APPENDIX D

Alleged deficiencies in repondents' car detention study

1. Failure to include the time for the grain inspection at origin.

This criticism is not relevant to the purpose of the detention study which is to determine average car delay due to each in-transit inspection on the carrier's tracks. The study is limited to the direct delays at the inspection station based on comparison of inspected cars with a comparable group of uninspected cars.

2. The number of inspected or uninspected cars is so small that no meaningful conclusion could be drawn in numerous instances for the comparisons that are made.

Particular reference is made to Belmond where there are 82 inspected cars and 1 uninspected car in the DI category. However, differing subsample sizes for the sample stations for inspected and uninspected cars for the three categories used is accounted for in the standard error since all cars at each sampled station were randomly selected. (Also, the uninspected cars at Belmond were drawn at 100-percent rate for the study.)

3. There may be more weekend handling time for inspected cars as compared to uninspected cars, and the study should exclude the detention time for Saturdays and Sundays.

It is not clear whether there is more handling time on weekends for inspected cars than uninspected cars. Even if there were, it would not invalidate the study. A table is set out below showing the total number of inspected and uninspected cars in the sample summarized for day of the week. The ratio of inspected to uninspected cars in the last column indicates that there are proportionately less inspected cars arriving on the weekends than on the week-

days, 0.82 versus 0.91. It is apparent that there could be no upward bias in this case. Also, the delay time for weekends should be included because it is a proper part of the frame.

Total number of cars by day of week[1]

Day of week	Number inspected	Number uninspected	Ratio of inspected to uninspected cars
Grand total	1,549	1,750	0.89
Weekend total	437	530	0.82
Weekday total	1,112	1,220	0.91
Saturday	284	343	0.82
Sunday	153	187	0.81
Monday	203	194	1.05
Tuesday	262	236	1.11
Wednesday	178	233	0.76
Thursday	235	256	0.92
Friday	234	301	0.77

1. Excludes counts of cars for holidays.

4. Handling of the flagrantly unrepresentative results at Alton.

Respondents were criticized for discarding from the sample, three uninspected cars which terminated at Alton and using instead an estimate of 1 hour. The carriers contend that the delay time of minus 32 hours reported for Alton was unrepresentative. Respondents developed the average handling time of uninspected cars at Alton of 54 hours after determining that the high handling time of three uninspected cars was the cause of negative delay time. The substitution of 54 hours appears reasonable and proper. It was developed on the basis of using 1 hour for the switching time and 53 hours for the constructive placement time. If a flagrantly outlandish result for a subgroup turns up which significantly distorts the summary results there are statistical grounds for discarding that result.

5. Failure to discard uninspected cars which produced long detention time.

The statistical rule is that all handling time of every study car inspected or uninspected be included. The one exception is the situation for Alton. The figures for some of the long delayed cars in the sample which happen to be inspected cars have been established as correct by the respondents. They properly belong in the study. The frequency table below shows that Alton alone represents a group average which is outlandish. The minus 32 hours is the only figure that can be deemed as being flagrantly unrepresentative.

Frequency distribution of delay times for stations caused by inspection

Average delay time	Number
Total	27
0 - 24	0
25 - 49	3
50 - 74	9
75 - 99	10
100 - 124	4
125 - 149	1
Range of averages: 39 to 145 hours.	

6. The sample did not represent situations correctly at certain locations.

The answer is that the car detention study was not meant to obtain valid estimates for any particular subgroups. It was designed to obtain an overall estimate for delay time for the entire station and time frame.

APPENDIX E

Comparative showing of the costs and rates for handling freight cars for the purpose of in-transit grain inspection in the western district (year 1968), (dollars per car).

Line No.	(1)	Respondents: High range costs (2)	Respondents: Low range costs (3)	Protestants' costs (4)	Restated costs (5)
1	Car detention costs....	$10.14	$7.28	$7.31	[1]$6.81
2	Switching costs[2]	6.38	6.38	....	6.38
3	Added clerical costs[3] ..	.84	.84	....	.84
4	Cost of backhaul[4]	1.03	1.03	....	1.03
5	Cost of extra switching	NA	NA	....	NA
6	Loss and damage costs.	NA	NA	....	NA
7	Total costs	18.39	15.53	[5]7.31	[6]15.06
	Proposed charges:		Eastern district costs		
A	Eastern and southern territory	$14.33—	($5.16 car detention + $7.85 switching costs + $0.92 clerical = $13.93 at 4-percent return)		
B	Western territory (east of Missouri River) ..	13.78			
C	Western territory (west of Missouri River) ..	13.36			

1. Based on corrected data of 3.04 car days additional detention for inspected grain cars—$2.24 per day costs. (Rail Form A at 4 percent return.)

2. Based on corrected data of 8.39 miutes per inspected car at $0.76070 per minute.

3. Based on lower range costs from exhibits of record.

4. Lowest backhaul cost from exhibits of record.

5. Protestants did not show costs other than detention of car costs.

6. This cost does not include loss and damage costs, added switching or additional transits for second inspection en route.

APPENDIX B

Served September 29, 1971

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 8548

INSPECTION IN TRANSIT, GRAIN AND GRAIN PRODUCTS

Decided September 21, 1971

1. On reconsideration, proposed new or increased charges for in-transit inspection of grain at various points in the United States found just and reasonable and otherwise lawful. Prior report 339 I.C.C. 364.

2. Jurisdiction retained to receive and review reports required to be filed by respondents.

Appearances shown in the prior report and in addition: *Carl F. Schwensen, Fred B. Adam,* and *D. J. Russell* for protestants and *Mel Thompson* for the Honorable Keith G. Sebelius, United States House of Representatives, for First District, Kansas.

REPORT AND ORDER OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In the prior report, 339 I.C.C. 364, decided April 16, 1971, division 2 found that proposed new or increased charges for in-transit inspection of grain at various points in the United States were just and reasonable and otherwise lawful and entered its order discontinuing the proceeding. We had earlier determined that the proceeding presented an issue

of general transportation importance which action sanctioned, under section 1.101 of the General Rules of Practice, the filing of petitions for our reconsideration of the division's report and order. The schedules publishing the charges became effective on May 4, 1971, but pursuant to the indicated Rules of Practice many of the protestant parties to this proceeding filed petitions for reconsideration, some of which contained requests for oral argument. In response to the latter we heard the parties in oral argument on August 24, 1971, and subsequently, reopened the proceeding for reconsideration.

Initially, a procedural matter requires attention. On August 16, 1971, just prior to the oral argument, certain protestants filed a motion to strike portions of the respondents' reply to the petitions for reconsideration or, in the alternative, that we receive for consideration a number of documents attached to the motion. Respondents oppose both the motion and the alternative request in a reply filed September 7, 1971. The matter sought to be stricken and the addenda to the motion are concerned with conflicting analyses of the reaction of grain interests after the inspection charge became effective on May 4, 1971. The record as submitted supports our findings. The addition of self-serving unverified statements directed to events arising after the hearing was closed adds nothing of probative value. The motion of the protestants will be granted. The alternative request by protestants is thereby moot.

There will be no attempt to restate herein the scope of this extended and highly controverted proceeding. The complex factual and legal issues are described in detail in the earlier report and there is no serious challenge to the major portion of that recitation. Nor is there much fault to find with many of the preliminary findings of fact reached by the division. Accordingly, it should be stated at the outset that, following a careful review of the division's report and

order and an analysis of the record in the light of the arguments advanced orally by the parties, we adopt and affirm the findings and conclusions reached in the earlier report except to the extent modified subsequently herein. Such findings and conclusions are fully supported by the record and a restatement and review in this report would be repetitive and serve no purpose. Certain aspects of this proceeding appear to require some elaboration, or greater emphasis, and to a limited degree modification of the conclusions of division 2, and that is the reason for this brief report. In the interest of clarity, it will be necessary to set forth a brief description of the proceeding.

As noted by division 2, in-transit inspection relates to the practice of stopping railroad cars loaded with grain and grain products, including soybeans, and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the car. The inspection is the taking of a representative sample or samples to determine the official grade of the contents of the car for the purpose of establishing value of the commodity at the market. It does not include any inspection on tracks of the shipper at either origin or destination.

By far the predominant portion of the grain and grain product traffic that receives the in-transit inspection moves within the West. For many years the railroads that originate substantial quantities of this traffic have made provision for sampling and inspection while the loaded cars were in transit. The provision of the Federal statute which prior to 1968 required an inspection to establish the official grade could have been satisfied by inspection at point of origin prior to loading of the railroad cars or at point of destination after the cars had been delivered to the consignee. The inspection in transit, as a practical matter, was more convenient for the grain trade and in *Grain and Grain Products,*

205 I.C.C. 301, 215 I.C.C. 83, the Commission approved the practice and provided for its continuance at the line-haul rates. There has been some erosion of the practice where the railroads have established reduced rates for particular movements of grain. However, the so-called docket No. 17000, Part 7 maximum rates (the basis prescribed in *Grain and Grain Products, supra*), and the currently effective rates for general application which are on a lower level than the prescribed basis, continued to provide for the in-transit inspection without charge in addition to the line-haul rates until the considered schedules became effective of May 4, 1971. On grain movements where the docket No. 17000, Part 7 bases of rates are applicable, the in-transit inspection charge does not apply. Nor does the charge apply where the line-haul rates plus the inspection charge equals or exceeds the maximum prescribed level.

The considered tariff schedules provide, as indicated, for new or increased charges by the rail carriers of this country for the first inspection of grain and grain products while in transit in railroad service. There has been a charge for this inspection service by the carriers on movements of the considered commodities within eastern territory.[1] The schedules increase that charge and they also publish a charge for the first time on the initial in-transit inspection stop on grain and grain products moving in railroad service within the western district[2] and within southern territory.[3] As indicated earlier, and more particularly described in the prior report, there is only limited opposition to the increased proposed charge by the eastern respondents and none in

1. Territory generally east of the Illinois-Indiana State line and north of the Ohio River.

2. Territory west of the Great Lakes and on and west of the Mississippi River (including east bank points), Illinois and the Upper Peninsula of Michigan.

3. Generally the territory east of the Mississippi River and south of the Ohio River.

connection with the establishment of the charge for the inspection service for movements within the South. Practically all of the extensive opposition in the instant proceeding is directed to the publication of the charge for the first in-transit inspection charge within the West. As detailed in the prior report the charges range from $15.86 to $17.32 per car, and the division's conclusion that such charges are not excessive in amount is clearly warranted on the basis of the convincing evidence of record showing the costs sustained by the railroads in performing the in-transit inspection service. Protestants' assertions that the respondents' detention and cost studies of the in-transit inspection service are without probative value have little merit and need not be discussed herein. The division's findings and conclusions in this area are affirmed.

Our primary purpose in further considering the issues herein is to examine and evaluate two arguments stressed by protestants in their petitions and at the oral argument. The first is concerned with the receipt of evidence tendered by the respondent railroads, and received by the hearing examiner over the objection of the protestants, showing certain legislative history developed in connection with the enactment of the Grain Standards Act of 1968. Respondents offered this evidence to support their contention that freight car utilization was an important factor leading to the passage of the revised act which, as described in the prior report, eliminated the mandatory requirement for inspection of interstate movements of whole grains sold by grade and shipped to and from designated markets. The protestants submit that the revised statute is not ambiguous or unclear in any respect, and reference to the legislative history constituted prejudicial error. It is their view that railroad freight car utilization was not a factor of any consequence in the enactment of the revision of the Grain Standards Act and reference to certain testimony before

the appropriate committees of the Congress considering such revision created the false impression that the Congress modified the mandatory aspect of grain inspection to aid railroad car supply. The protestants also insist that such evidence unduly influenced division 2 and provided unjustified support for the railroads' position that the in-transit inspection charge is just and reasonable.

From a careful review of the division's analysis of the record and an examination of its findings, we are persuaded that the parties' assertions concerning the evidence directed to legislative history of the 1968 act are unfounded. Consideration of this legislative history in the prior report was merely as one factor supporting the ultimate conclusion of division 2 that the considered schedules were just and reasonable. This is evidence from the following finding, and ultimate conclusion set forth in the prior report;

> • • • Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute. However, it is equally clear that *improved car utilization in the movement of the whole grain by railroad was a consideration in the revision.* 339 I.C.C. at page 370. [Emphasis supplied.]

Summary.—• • •

> 1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and *increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with* evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain. 339 I.C.C. at page 401. [Emphasis supplied.]

The other area requiring additional comment, and a modi-

fication of rather an elaboration of the division's findings, relates to the revenue aspect of the inspection charge. Throughout the proceeding and particularly subsequent to the service of the division's report, protestants have urged that the inspection charge is directed essentially to the production of additional carrier revenue and they assail the validity of the railroads' contention that the basic reason for the imposition of the charge is increased car utilization. The division acknowledged the soundness of respondents' showing as to increased car utilization. We are convinced, as was the division, that the respondent railroads are more concerned with increasing utilization of its freight cars than they are in collecting the inspection charge. The record is clear that revenues to be derived from greater utilization of the cars substantially exceeds the amount otherwise obtained through imposition of the charges published in the considered schedules.

It is impossible to determine at this stage the amount of revenue that will be collected as a result of the inspection charge. We believe that such a determination is a relevant and material factor because of the conflicting forecasts of the effect of the imposition of such a charge. Accordingly, the respondent railroads, parties to the considered tariff schedules, will be required to maintain a record of the amount of money collected from the assessment of the charge beginning October 1, 1971, and to file a report with this Commission prior to June 30, 1972, setting forth the total collected by each respondent for the 6-month period subsequent to October 1, 1971. Similar reports will also be filed on or before December 31, 1972, for the 6-month period April 1, through September 30, 1972, and are to be continued for subsequent 6-month periods pending further order of the Commission.

We will retain jurisdiction of the instant proceeding to determine upon still further review whether we will require

that funds derived from the assessment of the considered charge, or any part thereof, be used to upgrade the fleets of freight cars operated by respondents.

Subject to the foregoing modification, we find that the report and order of division 2 in this proceeding, 339 I.C.C. 364, should be affirmed and that the petitions of protestants for findings inconsistent with those set forth in the indicated division report should be denied.

CHAIRMAN STAFFORD, concurring:

My chief concern is the extra burden this inspection charge could place on the grain producer. I am not fully persuaded that in transit inspection will be eliminated to any significant degree in the foreseeable future. However, I concur with the majority because of two overriding factors. The first is the belief formed by a review of the extensive record that the origin sampling and inspection of grain is the more effective procedure to follow, and the one most advantageous to the grain grower. The imposition of the in-transit charge will speed the increased use of this form of grain sampling. The second is directed to car utilization. My analysis leads me to the determination that there will be greater car availability as a result of the charge particularly during the critical car shortages that normally attend the grain harvest. These conclusions also quiet the doubts held concerning the legal aspects of the initial establishment of the charge in the West.

COMMISSIONER GRESHAM, dissenting:

I would find the present proposal not shown to be just and reasonable without prejudice to the resubmission of a proposal to separate the charge for in-transit inspection from the line-haul rate or charge and to reduce the line-haul rate or charge by a commensurate amount.

COMMISSIONER TUGGLE did not participate.

It is ordered, That the proposed new or increased charges for in-transit inspection of grain at various points in the United States are just and reasonable and otherwise lawful, and the findings in the prior report, 339 I.C.C. 364, be, and they are hereby, affirmed.

It is further ordered, That the respondents be, and they are hereby, required to submit reports showing the revenues derived from the collection of the said inspection charges in accordance with the schedule set forth in the report.

It is further ordered, That jurisdiction be, and it is hereby, retained by the Commission to further review the findings herein after receipt of the reports described in the preceding paragraph.

It is further ordered, That the motion of protestants filed August 16, 1971, to strike designated portions of respondents' reply to the protestants' petitions for reconsideration be, and it is hereby, grant-

And it is further ordered, That the petitions of protestants for findings inconsistent with those set forth in the prior report, 339 I.C.C. 364, as modified herein, be, and they are hereby denied.

By the Commission.

ROBERT L. OSWALD,
Secretary.

(SEAL)

APPENDIX C

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, vs. THE UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants.	Civil Action No. W-4730

FILED
MAY 24, 1972
ARTHUR G. JOHNSON, Clerk
By Beth A. Coon, Deputy

JAMES E. BARRETT, United States Circuit Judge
FRANK G. THEIS, United States District Judge
EARL E. O'CONNOR, United States District Judge

OPINION OF THE COURT

PER CURIAM

This is an action to enjoin, annul, set aside, and suspend orders of the Interstate Commerce Commission entered by the Commission, Division 2, on April 16, 1971, and by the Commission en banc on September 21, 1971, in proceedings entitled Investigation and Suspension Docket No. 8548, Inspection in Transit, Grain and Grain Products, reported at 339 I.C.C. 364 and 340 I.C.C. 69 respectively. A three-judge court was convened to hear the case. The suit is brought pursuant to the provisions of Sections 1336, 1398, 2284 and 2321-25 of Title 28 U.S.C.

By the reports and orders here assailed, the Commission has found just and reasonable the establishement of tariff provisions applicable throughout the West at the rate of $13.36 per car for the first in-transit inspection services historically provided by the rail carriers under the line-haul rates. The Commission did not require a reduction in the line-haul rates in relation to the reduced optional service.

The in-transit inspection service with which we are here concerned has reference to the practice of stopping railroad cars loaded with grain and grain products and placing them on railroad track facilities for the purpose of permitting inspection of the contents of the car, awaiting disposition orders from shippers after inspection, and the subsequent movement of the railroad car. The sample or samples tested determine the official grade of the contents of the car for the purpose of establishing its value at market.

This transit service has been historically provided by the rail carriers in the West as part of the line-haul rates. Until 1968, federal law required official federal inspection and sampling. That function was performed by federal officials. That requirement was eliminated by the Congress in 1968, 82 Stat. 761, 7 U.S.C. §§ 71 *et seq.* The primary purpose of the Congress was to effect an increased utilization of rail cars. In its brief the Commission noted that car shortages on a nation-wide basis was a grave problem and that "the Commission's action here represents a determination to employ all rational and lawful means to attempt to alleviate the difficulty."

After extensive hearings the Commission found that: (1) the proposed charges do not apply in any instance where applicable line-haul rates plus the charge would exceed the maximum reasonable rates set forth in Grain and Grain Products, 205 I.C.C. 301 (1934), 215 I.C.C. 83 (1936), (2) inspection of grain is no longer a mandatory requirement

of federal law, (3) there is a need for inspection at some point in the grain marketing process, but inspection in-transit is not essential, and (4) grain inspection in-transit is an "accessorial" service for which a charge separate from the basic line-haul charges may be properly assessed. The Commission then found that the proposed charges were just and reasonable in that the railroads established by substantial evidence that the costs associated with in-transit inspection correspond to the level of the proposed charges and that delays resulting from in-transit inspection amount to more than three days per car. There is substantial evidence in support thereof.

The Commission recognized that the Western railroads were not primarily assessing a charge in their line-haul rates for the first stop for inspection. The protestants here contend that under these circumstances the railroads could not segregate the inspection services and assign to it a separate charge without presenting substantial evidence that the new aggregate rate, composed of the line-haul plus inspection-transit rates, represent a just and reasonable rate for all of the services.

In its discussion and conclusions, the Commission found that: "A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding (Transit Charges, Southern Territory, 332 I.C.C. 664 [1968]) - - - However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here. That difference is that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less

that the maximum reasonable level determined by this Commission." In its brief the Commission refers to the "extreme difficulty" involved in putting together thousands of such rates for the purpose of determining the reasonableness of a charge for a separate accessorial service. The Commission ultimately justified its rationale predicated upon the maximum level of rates which it established some 35 years ago in its Docket No. 17000 proceedings, Grain and Grain Products, *supra*.

While purporting to "distinguish" the instant decision from its prior decisions, the Commission discovered that which had been known for years: the maximum reasonable rates established in its Docket No. 17000 cases. This discovery suddenly became a "significant distinguishing feature" in its decision here.

There may be facts and circumstances justifying a Commission reversal of its well established rule that whenever a proposal is made for the establishment of an additional charge for a service that has been provided at the line-haul rates, the reasonableness of the proposed charge may not be divorced from the line-haul rates, the services thereunder, and the cost thereof. Transit Charges, Southern Territory, 332 I.C.C. 664 (1968); Grand Forks Chamber of Commerce, et al v. Great Northern Railway Company, et al, 321 I.C.C. 356 (1963); Investigation and Suspension Docket No. 5146, Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 (1943); Unloading Lumber to New York Harbor, 256 I.C.C. 463 (1943); Reconsignment Case No. 3, 53 I.C.C. 455 (1919). The difficulty generated by the Commission's ruling here is that instead of repudiating its long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall

services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom—which may be legally justified—it has attempted to "distinguish" this case from its prior rulings. In our judgment the Commission has failed in this respect. In effect, the Commission "excuses" the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers "inability" to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are "able" to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible. Secretary of Agriculture v. United States, 347 U.S. 645 (1954), is dispositive of this issue. There, as here, the Commission approved special charges, in addition to the existing line-haul rates, for unloading accessorial services. The protestants appealed contending that the service (a) is an essential part of the line-haul charge in that it relates to delivery, (b) that the line-haul rate encompassed the service and (c) that the service covered by the line-haul rate cannot be separately compensated unless the carriers show that the line-haul rate is inadequate to cover it. The Supreme Court held that each of these claims must be met by the Commission. The Court held that the Commission had not done so and that it had failed to explain its departure from prior norms and its legal basis for doing so. See also William N. Feinstein & Company v. United States, 209 F.Supp. 613 (S.D. N.Y. 1962); National Small Shipments Traffic Conference, Inc. v. United States, 321 F.Supp. 500 (S.D. N.Y. 1970). The same reasoning applies here. The Commission in the case at bar did not "explain its departure" from its prior norm by its contention that this case can be "distinguished" on the apparent proposition that here the

railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se: In those cases where the Commission determines that the carrier is able to meet the burden of proof that the separate charge is justifiable in relation to its overall line-haul rates, it must do so; on the other hand, in those cases where the rail carried is, in the judgment of the Commission, unable to carry the burden of proof, the separate charge will be approved if it does not exceed the "maximum reasonable rates" established in Grain and Grain Products, *supra*.

We recognize that activities and conditions in dynamic fields may dictate that because of later developments prior administrative construction and interpretation of a statute should no longer be binding if it does not achieve general legislative objectives. National Broadcasting Company v. United States, 319 U.S. 190 (1943). But a specific and long-standing administrative interpretation of a statute should not be overruled except for weighty reasons. Commissioner v. Estate of Sternberger, 348 U.S. 187 (1955). An administrative interpretive rule of long standing has the same force and effect as a statute and rules of evidence apply to both in the same manner.

The Commission here noted that "even though the combined line-haul rate and the proposed charge does not exceed the prescribed maximum level, it is still incumbent on the Commission to determine if the separate charge is reasonable when related to the specific service for which it is to be assessed." 339 I.C.C. at 388. This, then, was a departure from its prior interpretive decisions.

We hold that the Commission has not adequately explained, for purposes of our review, its departure from prior norms. It has not sufficiently spelled out the legal

basis of its decision. The Commission has not repudiated or overruled its prior decisions requiring that a carrier or carriers proposing separate and additional charges for accessorial services previously included within the line-haul rates may only do so if there is substantial evidence that the existing line-haul rates do not adequately cover the entire services. We are not convinced that the instant proceeding can be "distinguished" as the Commission has indicated. It does appear, however, that it has been distinguished by the Commission predicated upon the Commission's own determination of the burden of proof which it will require and impose in variable quantities, at its discretion, on a case-to-case basis.

We do not believe that the findings of the Commission are adequate in relation to our obligations and tasks on review. We recognize, just as the Supreme Court recognized in Secretary of Agriculture v. United States, *supra,* that "the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case." 347 U.S. at 652.

The matter is remanded to the Commission for further proceedings consistent with this opinion. The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court.

Dated this 24th day of May, 1972.

/s/ JAMES E. BARRETT
United States Circuit Judge

/s/ FRANK G. THEIS
United States District Judge

/s/ EARL E. O'CONNOR
United States District Judge

APPENDIX D

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., Plaintiffs, and EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES, Intervenor-Plaintiff, vs. UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants, and THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., Intervenor-Defendants.	Civil Action No. W-4730 Three-Judge Court

FILED
JUNE 8, 1972
ARTHUR G. JOHNSON, Clerk
By Jack Crawley, Deputy

ORDER AFFIRMING PREVIOUS OPINION AND DENYING MOTION FOR CORRECTION

Having before it the motion of the Interstate Commerce Commission and the intervening defendant railroads for correction of the opinion of the Court previously filed herein

on May 24, 1972, and having considered the briefs of the parties filed herein relative to correction of the opinion, the Court finds and hereby holds that the opinion as originally filed represents the considered judgment of the Court.

Accordingly, the motion of the defendants for correction of the opinion filed May 24, 1972, is hereby denied and overruled.

IT IS SO ORDERED.

At Wichita, Kansas, this 8th day of June, 1972.

/s/ JAMES E. BARRETT
United States Circuit Judge

/s/ FRANK G. THEIS
United States District Judge

/s/ EARL E. O'CONNOR
Judge

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

THE WICHITA BOARD OF TRADE, ET AL., **Plaintiffs,** **and** **EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES,** **Intervenor-Plaintiff,** **vs.** **UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION,** **Defendants,** **and** **THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL.,** **Intervenor-Defendants.**	**Civil Action No. W-4730 Three-Judge Court**

FILED
JUNE 9, 1972
ARTHUR G. JOHNSON, Clerk
By Helen Hope, Deputy

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., the Intervening Defendants Western Railroads, hereby appeal to the Supreme Court of the United States from the Opinion

of the above-entitled Court made and entered on May 24, 1972, and from the final order and judgment of the Court affirming the previous Opinion and denying defendants' Motion for Correction of Opinion made and entered on the 8th day of June, 1972.

This appeal is taken pursuant to 28 U.S.C., § 1253.

/s/ CHARLES W. HARRIS
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Attorneys for Intervening Defendants
THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY,
et al.

APPENDIX F

IN THE

SUPREME COURT OF THE UNITED STATES

SPECIAL TERM, 1972

July 7, 1972

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

ORDER

On consideration of the appellants' application for stay, the appellees' reply to the application, and the affidavits and memoranda filed in support of the application and reply, IT IS ORDERED:

(1) That, subject to the condition set forth in paragraph 2 herein, the judgment of the United States District Court for the District of Kansas entered in this matter on June 8, 1972, be and hereby is stayed pending a final determination of the appeal by this Court.

(2) That, as a condition of the foregoing stay, each railroad collecting in-transit grain inspection charges under the challenged tariffs shall immediately take steps, including publication of appropriate provisions in applicable tariffs, to do the following:

(a) keep accurate accounts in detail of all amounts hereafter received during the existence of the stay by reason of in-transit grain inspection charges, specifying by whom and in whose behalf such amounts are paid; and

(b) in the event the order suspending the charges is affirmed by this Court, refund (with interest) of such amounts to persons in whose behalf such amounts were paid, without the necessity for such persons to make applications for refunds. In the event this Court's action should be other than an affirmance of the results reached by the district court, this Court may make such further order concerning the disposition of the aforesaid amounts as the Court may deem appropriate.

APPENDIX G

The Atchison, Topeka and Santa Fe Railway Company
The Baltimore and Ohio Railroad Company
The Baltimore and Ohio Chicago Terminal Railroad Company
Burlington Northern Inc.
The Chesapeake and Ohio Railway Company
Chicago and Eastern Illinois Railroad Company
Chicago, Milwaukee, St. Paul and Pacific Railroad Company
Chicago and North Western Railway Company
Chicago, Rock Island, and Pacific Railroad Company
Colorado and Southern Railway Company
The Denver and Rio Grande Western Railroad Company
Elgin, Joliet and Eastern Railway Company
Érie Lackawanna Railway Company
Fort Dodge, Des Moines & Southern Railway Company
Forth Worth and Denver Railway Company
Grand Trunk Western Railroad Company
Gulf, Mobile and Ohio Railroad Company
Illinois Central Railroad Company
Illinois Terminal Railroad Company
Kansas City Southern Railway Company
Louisville and Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Monon Railroad Company
Norfolk and Western Railway Company
Penn Central Transportation Company
St. Louis-San Francisco Railway Company
St. Louis Southwestern Railway Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Texas and Pacific Railway Company
Toledo, Peoria & Western Railroad Company
Union Pacific Railroad Company
Western Pacific Railroad Company

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

On Appeal from the United States District Court for the District of Kansas

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion of the district court (Railroad J.S. App. C)[1] is not yet reported. The report of Division 2 of the Interstate Commerce Commission (Railroad J.S. App. A) is published at 339 I.C.C. 364, and was affirmed by a report of the entire Commission (Railroad J.S. App. B) published at 340 I.C.C. 69.

[1] "Railroad J.S. App." refers to the Appendix to the Jurisdictional Statement filed by the Atchison, Topeka & Santa Fe Railway Company et al., in the companion appeal from the same district court judgment, No. 72-214.

JURISDICTION

The opinion of the three-judge district court was entered on May 24, 1972. Appellant filed a motion for amendment of opinion on May 31, 1972. On June 8, 1972, the district court entered its order affirming the previous opinion and denying motion for correction (Railroad J.S. App. D). The Interstate Commerce Commission filed its notice of appeal on July 20, 1972 (App. *infra* pp. 12-13). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b). *City of Chicago* v. *United States*, 396 U.S. 162.

QUESTION PRESENTED

Whether a three-judge district court has power to suspend and make ineffective, until and unless otherwise ordered by that court, railroad charges which the Interstate Commerce Commission had found to be just and reasonable after suspension for the maximum period authorized by statute, simply because the court has held that the case must be remanded to the Commission for additional findings in support of its conclusion that the charges are lawful.

STATUTE INVOLVED

Section 15(7) of the Interstate Commerce Act, as amended (49 U.S.C. 15(7)), provides as follows:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual

or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such

amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

STATEMENT

By this appeal the Interstate Commerce Commission seeks summary reversal of that part of the lower court's decision which suspended and made ineffective railroad charges for services relating to the in-transit inspection of grain "until and unless otherwise ordered by this Court." (Railroad J.S. App. C7). This action was taken in conjunction with the court's remand of the case to the Commission for further proceedings consistent with its opinion. No appeal is taken from the remand.

This case began when the nation's railroads[2] filed

[2] The railroads involved are listed in Appendix G to the Railroad Jurisdictional Statement.

tariffs with the Commission, proposing new railroad charges for services in connection with the in-transit inspection of grain. The Commission instituted an investigation under § 15(7) of the Interstate Commerce Act (49 U.S.C. § 15(7)) and suspended the charges for the maximum seven-month period authorized by the statute. After the suspension period was voluntarily extended by the railroads involved for approximately six additional months, a Division of the Commission issued its report and order finding the charges to be just and reasonable and otherwise lawful (Railroad J.S. App. A1-A58). In support of its conclusion the Division found, *inter alia*, that imposition of the charges would deter use of the inefficient and time-consuming in-transit inspection procedure, which would "make a substantial contribution toward the improvement of the national freight car supply" (Railroad J.S. App. A51). The charges went into effect on May 4, 1971, and have been in effect since that time.

After issuance of a second report and order by the entire Commission affirming the Division, appellees filed this action under 28 U.S.C. 1336 to enjoin and set aside the Commission's orders. The district court, holding that the Commission failed to make adequate findings and to explain adequately its departure from "prior norms", remanded the matter to the Commission for further proceedings consistent with the court's opinion (Railroad J.S. App. C7).[3]

[3] The alleged "norm" to which the district court refers is the principle, observed by the Commission in some prior cases.

In addition—notwithstanding that appellees never requested such relief—the court also, without discussion of its power to do so, ordered that the inspection charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (Railroad J.S. App. C7).

Following entry of the district court's opinion, both the Commission and the railroads filed motions requesting the court to delete the last sentence of its opinion which imposed the suspension. By order entered June 8, 1972, the lower court denied the motions, holding that "the opinion as originally filed represents the considered judgment of the Court" (Railroad J.S. App. D2).

On June 9, 1972, the railroads filed their notice of appeal to this Court.[4] A motion for stay of judgment pending appeal was simultaneously filed in the district court and was subsequently denied. The railroads then applied to this Court for a stay, which was granted on July 7, 1972, subject to an accounting and a refund provision (Railroad J.S. App. F).

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that a new separate charge, when assessed for services formerly included within a line-haul rate, will be approved only when the charge plus the applicable line-haul rate without the service included is found to be just and reasonable. See, *e.g.*, *Transit Charges, Southern Territory*, 332 I.C.C. 644, sustained on other grounds *sub nom. Cincinnati N.O. & T.P. R. Co.* v. *United States* (unreported) (S.D. Ohio), *aff'd* 400 U.S. 932.

[4] Docketed on August 7, 1972, as *Atchison, T. & S.F. Ry. Co., et al.* v. *The Wichita Board of Trade, et al.*, No. 72-214 (O.T. 1972). The railroads' appeal is from the entire district court decision.

The Commission filed its notice of appeal on July 20, 1972 (App. A, *infra*, pp. 12-13).

THE QUESTION IS SUBSTANTIAL

By itself purporting to suspend the in-transit charges until further order of the court, the court below acted in direct contravention of this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658. This Court held in *Arrow* that the exclusive power to suspend rates under § 15(7) rests in the Commission, and that the Courts lack power to suspend rates or to extend Commission suspension beyond the maximum period provided by the statute. Construing § 15(7), the Court held that Congress, by fixing the period in which the Commission might suspend rates, must have intended to foreclose judicial power to extend that period (372 U.S. at 664). As the Court stated:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. [372 U.S. at 667]
>
> * * * *
>
> There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. *Texas & P. R. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426 [footnote omitted].

> This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive. [Id. at 668.]

Here the lower court exercised the very power which this Court in *Arrow* held that it could not exercise.

Arrow, of course, differs factually from the instant case in that there the judicial suspension of rates was sought while the case was still pending before the Commission in the first instance, while here the suspension has been imposed while the case is pending before the Commission on remand. But, as Judge Friendly recognized in *National Small Shipments Traffic Conference* v. *United States*, 321 F. Supp. 500 (S.D.N.Y.), this is not a material difference such as would negate application of the *Arrow* rule. In a decision directly in conflict with the case at bar, the district court in *National Small Shipments*,[5] after reviewing a final Commission decision upholding certain rates and finding it invalid, considered the question of its power under *Arrow* to order the rates suspended pending reconsideration by the Commission, and concluded (321 F. Supp. at 515):

> The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agree-

[5] The *Small Shipments* case involved § 216(g) of the Act (49 U.S.C. 316(g)), which applies to motor carriers. The statutory suspension language of § 216(g) is the same as that of § 15(7).

> ment; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, Arrow Transp. Co. v. Southern Ry., 327 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. We see no relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. In neither situation can we direct the Commission to reinstitute a suspension which had already continued as long as Congress allows.

We submit that Judge Friendly's analysis is plainly correct. As this Court recognized in *Arrow*, Section 15(7) represented a carefully considered Congressional judgment that the implementation of a new rate structure should be, in essence, a matter entrusted to the judgment of carrier management, subject only to a specifically delineated power—vested in the Commission alone—to delay such implementation for a maximum period of seven months. The rates thus implemented may, to be sure, subsequently be found unlawful and the carriers required, if the Commission so orders, to refund any excess charges collected in the interim (*Arrow*, *supra*, 372 U.S. at 666). But whether to run the risk of having to make such a refund, by implementing a rate change after the seven-month suspension period but before

the lawfulness of the rate change has been finally determined, is a business decision to be made by the carrier, which is free under the statute to collect the new charge unless and until it is finally adjudged unlawful.

By suspending the new in-transit charges "until and unless otherwise ordered by this Court" (Railroad J.S. App. C7), the court below has literally ignored the procedure carefully delineated by Congress in Section 15(7). The new charges have by no means been adjudged unlawful; indeed the lower court, while remanding the case to the Commission for failure to explain "its departure from prior norms" (Railroad J.S. App. C6), emphasized that "there may be facts and circumstances justifying a Commission reversal of" those norms—thus leaving open the possibility that the new charges may yet be found, either on the existing record or on the basis of additional evidence, to be just and reasonable. Yet its suspension order would prohibit the carrier from continuing to collect those rates—which have now been in effect for over 15 months—unless and until they are finally adjudged lawful by both the Commission and the Court. Plainly, such an order is in direct derogation of the statutory scheme as interpreted by this Court in *Arrow*, and is entirely improper.

CONCLUSION

Insofar as the judgment of the court below suspended and made ineffective the in-transit inspection charges until further order of that court, it should be summarily reversed.

Respectfully submitted,

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September, 1972

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

Civil Action No. W-4730

[Filed July 20, 1972, Arthur G. Johnson, Clerk
By /s/ Helen Hope, Deputy]

THE WICHITA BOARD OF TRADE, et al., PLAINTIFFS

and

EARL L. BUTZ, SECRETARY OF AGRICULTURE OF THE UNITED STATES, INTERVENING PLAINTIFF

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

and

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., INTERVENING DEFENDANTS

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that the Interstate Commerce Commission, one of the defendants herein, hereby appeals to the Supreme Court of the United States from the opinion of this Court filed May 24, 1972, and from the final order of this Court affirming the previous opinion and denying motion for correction filed June 8, 1972. This appeal is taken pursuant

to Sections 1253 and 2101 of Title 28, United States Code.

This the 19th day of July, 1972.

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General Counsel

Attorneys for the Interstate Commerce Commission

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Nos. 72-216 and 72-433

FILED
OCT 17 1972
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1972

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

On Appeal from the United States District Court for the District of Kansas

---

MOTION OF THE SECRETARY OF AGRICULTURE TO AFFIRM

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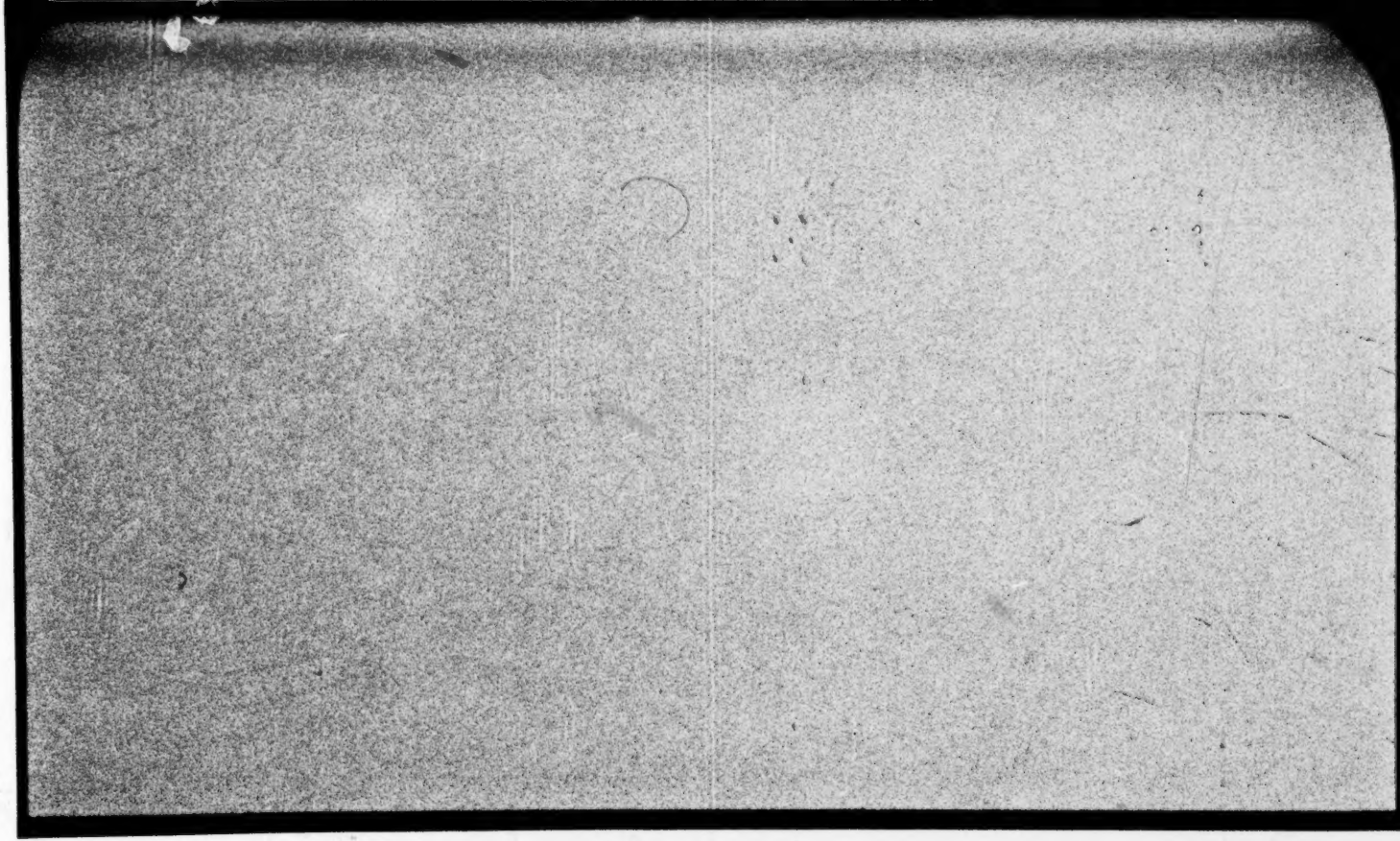

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

On Appeal from the United States District Court for the District of Kansas

---

MOTION OF THE SECRETARY OF AGRICULTURE TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the Secretary of Agriculture moves that the judgment of the district court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

1. Does the fact that a proceeding involves a large number of rates relieve the Interstate Commerce Commission of its statutory obligation to determine their reasonableness under established standards?

2. Does a level of rates originally prescribed by the Interstate Commerce Commission in 1934 but substantially increased by the railroads over the years in a series of non-prescribed, non-reviewable ex parte increases constitute a prescribed level of rates against which the reasonableness of other rates and charges may be gauged?

3. Does a three-judge district court have jurisdiction, ancillary to review of a final order of the Interstate Commerce Commission approving a new charge, to enjoin collection of the charge upon a finding that the order of the Commission is defective?

STATUTES INVOLVED

The statutes involved are Title 28 U.S.C. §§ 1651(a), 1336(a), 2324 and 2325; Title 5 U.S.C. § 706; and sections 13(1), 15(1) and 15(7) (49 U.S.C. §§ 13(1), 15(1) and 15(7)) of the Interstate Commerce Act. These statutes are set forth in the Appendix hereto.

STATEMENT

These are direct appeals under 28 U.S.C. 1253 from a decision of a three-judge district court (Railroad J. S. App. C) which remanded to the Interstate Commerce Commission the latter's decision and order in I. & S. Docket No. 8548, *Inspection in Transit, Grain and Grain Products*, 339 ICC 364, 340 ICC 69 (Railroad J.S. App. A and B, respectively), approving the imposition by the railroads of a separate charge for stopping carloads of grain in transit for inspection.

The Commission proceedings arose out of tariffs filed with the Commission by appellant railroads in February

1970 proposing to establish a separate charge of $14.33 per car for the first stop in transit for inspection, a service which for many years had been embraced in the line-haul rates. At the hearing, the railroads adduced evidence of the costs incurred in stopping a car in transit for inspection, and of the delays, in terms of lost car days, entailed in such stops. However, they presented no evidence of the cost of the line-haul service of which the stop for inspection was a part, nor did they divulge what portion of the line-haul rate represented compensation for the stop for inspection, although they conceded that the line-haul rates did in fact include compensation for the stop for inspection. The protestants, including the Secretary of Agriculture, objected to the separate charge as, in effect, a double charge for a single service. Protestants also pointed to the rule established by the Commission in prior decisions that where the railroads seek to establish a separate charge for a service embraced in the line-haul rate they must prove that the total transportation charges resulting from addition of the separate charge to the line-haul rate are just and reasonable. *Reconsignment Case No. 3*, 53 ICC 455; *Terminal Charges at Pacific Coast Ports*, 255 ICC 673; *Unloading Lumber at New York Harbor*, 256 ICC 463; *Transit Charges, Southern Territory*, 332 ICC 664. See also *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652.

By report and order served April 21, 1971 (Railroad J. S. App. A), the Commission's Division 2 found the proposed charge just and reasonable and otherwise lawful and discontinued the proceeding. Division 2 concluded that the in-transit inspection was neither mandatory nor essential to the orderly marketing of grain, that the evidence of the cost of the inspection stop adduced by the railroads justified the amount of the charge, that the charge would increase car utilization by eliminating the delays which attend inspection, and that its rule established in prior decisions requiring proof of the reason-

ableness of the total resulting charges was distinguishable because (1) the instant proceeding involved so many rates as to render such a requirement impractical and (2) the charge when added to the line-haul rate would not exceed the maximum level of rates prescribed by the Commission in Docket No. 17000, (Part 7), *Grain and Grain Products*, 205 ICC 301, 215 ICC 83. In a report and order on reconsideration served September 29, 1971, 340 ICC 69 (Railroad J. S. App. B), the full Commission reaffirmed the earlier decision of Division 2.

Appellees brought this action in the United States District Court for the District of Kansas, seeking to have the order of the Interstate Commerce Commission annulled, enjoined and set aside. The district court held that the Commission's findings in the above proceeding were not adequate to support its conclusions and remanded the matter to the Commission for further proceedings. The district court also ordered the charges then in effect suspended and ineffective until and unless otherwise ordered by the court.

ARGUMENT

1. Appellant railroads have challenged the correctness of the district court's decision on the merits on the ground that the court ignored the findings of the Commission and based on its decision on *dictum* in the Commission's order. The district court's decision was clearly correct, however, and the failure of the Interstate Commerce Commission to appeal on the merits is indicative of the insubstantiality of appellant railroads' appeal.

For over fifty years the Interstate Commerce Commission has required inquiry into the line-haul rate before approving a separate charge for a service already being performed under that rate. *Reconsignment Case No. 3*, *supra*, at 468; *Terminal Charges at Pacific Coast Ports*, *supra* at 677; *Unloading Lumber at New York Harbor*, *supra* at 468; *Transit Charges, Southern Terri-*

tory, supra at 683-684. As the Commission held in *Reconsignment Case No. 3, supra*: "Where a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such a charge, the entire through service of which it forms a part and the compensation heretofore received for such service." 53 ICC at 468.

In the present case, however, the Commission failed to follow this established rule. Instead, and without repudiating its prior decisions, it attempted to distinguish the present case from *Transit Charges, Southern Territory, supra*, the most recent of the above-cited line of cases, in which a similar charge was held unlawful. The Commission stated that "a requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a change" because of the thousands of individual line-haul rates involved. (Railroad J. S. App. A 32).

We submit that the district court properly rejected this rationale. The fact that a long-standing rule establishing a burden of proof may prove onerous in a particular proceeding is no justification for relieving the railroads entirely of their obligation to prove the reasonableness of the total charge resulting from the addition of the new charge to the existing line-haul rates. The Commission long ago devised a judicially acceptable solution to this problem by requiring introduction of typical evidence representative of the rate structure as a whole. See e.g., *New England Divisions Case*, 261 U.S. 184, 197-198. It was the statutory obligation of the Commission to determine the reasonableness of the charge consonant

with the standards and procedures it had developed over the years in similar cases. The Commission may, of course, revise and adapt those standards and procedures to meet changing situations. *Secretary of Agriculture* v. *United States, supra* at 652. Here, however, the Commission made no attempt to adapt its standards and procedures to the situation with which it was confronted. Rather, it simply abandoned its statutory obligation to determine the reasonableness of the total transportation charges resulting from the imposition of the new inspection charge.

Realizing, perhaps, the frailty of its rationale for departing from the rule of its prior decisions, the Commission made no mention of it in its summary of chief subsidiary findings. (Railroad J. S. App. A 51). Instead, it predicated its approval of the charge on a finding that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket No. 17000, Part 7, *Grain and Grain Products, supra.* (Railroad J. S. App. A 51).

This finding, as it stands, is factually incorrect. What the Commission meant, as it acknowledges elsewhere in its report, is that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket 17000, Part 7, *supra, plus all subsequent authorized general increases.* The distinction is significant, as but a single comparison readily demonstrates. The rate from Williston, North Dakota to Minneapolis, Minnesota prescribed by the Commission in 1934 was 27.5 cents per hundredweight. 205 ICC at 503. As a result of subsequent general increases, the rate between those same two points at the time the new charge became effective in May 1971 was 72.5 cents per hundredweight. This example is representative. Most, if not all, of the grain shipments in the West move on rates which greatly exceed the rates prescribed in 1934 in Docket No. 17000, Part 7.

The important point, of course, is that in general increase cases the Commission does not prescribe the increased rates nor does it pass upon the reasonableness of any particular rate or charge. Rather, it looks at the carriers' revenue needs and the general level of all rates. *Brimstone R.R. Co.* v. *United States*, 276 U.S. 104, 122. Increases which arise out of ex parte proceedings are therefore carrier made rates, not Commission prescribed rates. *Eagle Cotton Oil Co.* v. *Southern Ry. Co.*, 51 F. 2d 443, 445 (5th Cir. 1931); *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487, 494 (E.D. Va. 1935); *City of Danville* v. *Chesapeake & O. Ry. Co.*, 34 F. Supp. 620 (W.D. Va. 1940); *Mode-O-Day Corp.* v. *A. T. & S. F. Ry.*, 325 ICC 390, 396. Furthermore, Commission orders approving general rate increases are unreviewable. *Atlantic City Electric Company* v. *United States*, 306 F. Supp. 338 (S.D. N.Y. 1969) and *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D. D.C. 1969), both aff'd 400 U.S. 73; *Electronic Industries Association* v. *United States*, 310 F. Supp. 1286 (D.D.C. 1970), aff'd 401 U.S. 967. These decisions are premised upon the argument that since the rates in a general increase case are carrier made and not prescribed, they are subject to Commission adjustment in subsequent administrative proceedings. We submit that in this case where the Commission was called upon to determine the reasonableness of the total charges resulting from the combination of the existing line-haul rates and the new separate charge that it may not properly discharge this obligation by limiting its inquiry to whether the ex parte level is exceeded.

In *Secretary of Agriculture* v. *United States*, *supra*, this Court held that when the Interstate Commerce Commission departs from prior norms it must adequately explain the legal basis of its departure. Here, the Commission has attempted to explain its departure from prior norms by citing two "distinguishing features" present in the instant proceeding. However, as we have shown,

both of the Commission's attempted distinctions are invalid. Therefore, we submit that the District Court was constrained to remand the matter to the Commission. See *Ringsby Truck Lines, Inc.* v. *United States*, 263 F. Supp. 552, 558 (D. Colo. 1967), app. dis. 389 U.S. 576.

2. Appellants argue that in enjoining collection of the inspection charge the district court acted in "square conflict" with this Court's decision in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. This is simply not the case. In *Arrow*, the Court held only that, *prior* to a final order of the Commission, the courts are without power to extend the seven month suspension period provided for by section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7). The rationale behind the *Arrow* decision was that when Congress enacted the Mann-Elkins Act in 1910 (36 Stat. 552) and gave the Interstate Commerce Commission jurisdiction to suspend proposed rates pending final order by the Commission it extinguished judicial power to suspend such rates prior to such order.

Before the enactment of the Mann-Elkins Act there was a split of authority concerning the question of the power of a federal court to enjoin proposed rates prior to an administrative determination of their lawfulness, with the majority of lower federal courts being of the opinion that such relief could not be granted. *Board* v. *Great Northern Ry.*, 281 U.S. 412, 429. The exclusive authority to suspend proposed rates conferred upon the Commission by the Mann-Elkins Act was intended by Congress to remove the uncertainty which existed concerning the relief available to a shipper *prior* to an administrative determination of the lawfulness of a proposed rate. There is no evidence that Congress intended that provision to apply to the situation in which an administrative determination of the lawfulness of a rate has been made. This was recognized in the *Arrow* decision where, in explaining the decision in *Cantlay & Tanzola* v. *United States*, 115 F. Supp. 72 (S.D. Cal. 1953), this Court quoted with approval the statement in *Cantlay* that: "The

Congressional intent [underlying § 15(7)] plainly is that the courts not interfere to suspend carrier-made rates prior to an appropriate finding by the Interstate Commerce Commission. 115 F. Supp. at 83." 372 U.S. at 667, n. 15.

The distinction between suspension prior to Commission action and injunction thereafter was painstakingly drawn by the *Arrow* district court in its conclusions of law which the Court of Appeals quoted with approval, 308 F. 2d 181, 183:

CONCLUSIONS OF LAW

1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates.

2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates. The only jurisdiction of a court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court, upon complaint filed against the United States as a necessary defendant, to review the order of the Commission.

This Court noted the close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates. 372 U.S. at 668. The Court further specifically disclaimed any reflection upon "decisions which have recognized a limited judicial power to preserve the Court's jurisdic-

tion or maintain the *status quo* by injunction pending review of an agency's action through the prescribed statutory channels." 372 U.S. at 671, n. 22. Surely, in the face of the district court's second conclusion of law, quoted with approval by the Court of Appeals, this Court was constrained to dissent had it considered the view there expressed to be erroneous.

The *Arrow* decision is clearly premised upon a presumed Congressional intention to preserve in the Interstate Commerce Commission exclusive jurisdiction to suspend proposed rates incident to its primary jurisdiction to determine their lawfulness. As such, it stands as an exception to the general rule that federal courts can employ injunctive relief to prevent irreparable injury pending such administrative determinations. *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2d Cir. 1948), cert. dis. 336 U.S. 908; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), app. dis., 336 U.S. 941; *Pennsylvania Motor T. Ass'n* v. *Port of Phila. M. T. Ass'n.*, 183 F. Supp. 910 (E.D. Pa. 1960); *Board of Governors, Etc.* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 884 (S.D. Ind. 1948). The question of the jurisdiction of a district court to award injunctive relief after the primary jurisdiction of the Interstate Commerce Commission has been exhausted was not presented to the Supreme Court in *Arrow* and the Court specifically disclaimed any intention of ruling upon that question. See 372 U.S. at 671, n. 22. The rule established in *Arrow* should not be extended to oust federal courts of their traditional power to grant injunctive relief ancillary to review of administrative orders.

Furthermore, it is settled that district courts have jurisdiction to enjoin the effectiveness of tariffs upon review of Commission action in complaint proceedings brought under section 13 of the Interstate Commerce Act, 49 U.S.C. 13. *Inland Steel Co.* v. *United States*,

306 U.S. 153. Whether the Commission completes its investigation prior to expiration of the statutory seven month suspension period or not, section 15(7) of the Interstate Commerce Act, 49 U.S.C. 15(7), empowers the Commission to make such order with reference to a proposed rate as would be proper in a proceeding initiated after the rate had become effective, *i.e.*, upon complaint under section 13 or on the Commission's own initiative under section 15(1), 49 U.S.C. 15(1). We perceive no relevant distinction between a proceeding under section 15(7) of the Act and a proceeding under section 13 of the Act which would justify denial of equitable relief upon review of final Commission action in the former. In both cases the Commission's primary jurisdiction has been exhausted.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted.

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I authorize the filing of this motion.

ERWIN N. GRISWOLD
Solicitor General

OCTOBER 1972

APPENDIX

Title 28 U.S.C. § 1651 (a)

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. § 1336 (a)

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

Title 28 U.S.C. § 2324

§ 2324. Stay of Commission's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action.

Title 28 U.S.C. § 2325

§ 2325. Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Title 5 U.S.C. § 706

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant

questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Title 49 U.S.C. § 13 (1)

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions

thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Title 49 U.S.C. § 15 (1)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter,

the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Title 49 U.S.C. § 15 (7)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for

such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

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[redacted]

[redacted]

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et. al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

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MOTION TO AFFIRM OF WICHITA BOARD OF TRADE, et. al.

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In the Supreme Court of the United States

Nos. 72-214 and 72-433

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
and **INTERSTATE COMMERCE COMMISSION**,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et. al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

MOTION TO AFFIRM OF WICHITA BOARD OF TRADE, et. al.

Appellees, Wichita Board of Trade, *et al.*, listed in Appendix I hereto, respectfully move, pursuant to Rule 16 of the Rules of this Court. that the order of the dietriet court in this case be affirmed on the ground that the questions presented are so unsubstantial as not to warrant further briefing or oral argument.

STATEMENT

These appeals arise out of an attempt by the railroads to remove the service of grain inspection* from their services historically embraced by the line-haul rates in the West and to establish an additional charge for such service. Their proposal drew broad opposition from the grain industry, including most of these appellees who, collectively, speak for the grain exchanges and thousands of farmers, country elevators, grain companies and merchants in the West. On the basis of protests, the Interstate Commerce Commission initiated an investigation into these tariff changes in a proceeding where the burden of proof was placed upon the railroads by statute to show that the changes proposed are just and reasonable. The Commission suspended the tariffs for the seven month-period allowed to it during its investigation.

The railroads were inspired to make this proposal by an amendment made to the United States Grain Standards Act (7 U.S.C. § 71 *et seq.*) in 1968 whereby a statutory requirement that every car of grain be inspected was removed. That amendment was supported by the grain trade, including these appellees, in order to obviate certain inspections which had served no purpose, e.g., intra-company shipments. No representations were made to Congress by the railroads or anyone else that the amendment was needed to withdraw inspection from the services

* The railroads do not perform the grain sampling inspection service. The service is performed by state-licensed grain inspectors paid by shippers to determine the grade and condition of the grain. The railroads merely make the cars available for a few hours for that purpose.

provided under rail rates or as justification for a penalty charge. The Commission correctly concluded here that:

> Neither the provisions of the revised Grain Standards Act nor the legislative history indicates that improved car utilization was the primary factor in the enactment of the 1968 statute (App. A-11*).

Nevertheless, the railroads proceeded in the case before the Commission to forecast an improved car supply from their proposal and placed primary emphasis on that claim, either to distract the Commission from the legal issues** involved or simply to gain the Commission's sympathy. They urged that the purpose of the additional charge is to serve as a barrier against inspections and to eliminate all or most of the inspections. The evidence of the grain trade showed that this penalty would destroy the grain marketing system (including many small businesses engaged in it) which had been established for decades; and that the penalty charge would have to be borne by the farmers who could ill-afford it.

During the investigation and prior to the date of the Commission's administratively final decision (September 21, 1971), the seven month-suspension period allowed to the Commission for its investigation had passed and the railroads placed the new charges into effect. The Commission ultimately decided that the tariff changes had been proved to be just and reasonable and, accordingly, allowed them

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* References herein are to Appendices A to F of the railroads' Jurisdictional Statement.

** An indication of the railroads' success in circumventing the legal issues concerning the new charge is evident from the expression in the report by the Chairman of the Commission that the car supply argument served, in part, "to quiet the doubts held concerning the legal aspects" of this proposal (App. B-8).

to remain in effect.* (App. B-9) These appellees then brought an action to set aside the Commission's report and order which allowed the charges to continue in effect.

The Court below (1) set aside the Commission's decision on the grounds that it had misinterpreted the statutory burden of proof in this case which requires evidence establishing that the combination of the existing rates, which concededly compensated the railroads for the inspection service, plus the new charge would be just and reasonable and (2) since no evidence had been submitted by the railroads to that effect, remanded the matter to the Commission "for further proceedings consistent with this opinion" and ordered that the "charges are suspended and shall be ineffective until and unless otherwise ordered by this Court".

The railroads filed their Notice of Appeal and, in the closing hours of the 1971 Term, obtained a stay under which the charges are presently in effect. Several weeks later, the Commission filed its Notice of Appeal. Notably, while the railroads attack both the merits of the opinion and the enjoining of the charges, the Commission challenges only the power of the Court below to enjoin the charges.

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* Commissioner Gresham dissented on the grounds that in order for the railroads justly and reasonably to establish an additional charge for inspection they must contemporaneously reduce by a commensurate amount the line-haul rates, inasmuch as they included compensation for that service (App. B-8).

QUESTIONS PRESENTED

1. Whether the Court, upon deciding that the Commission had misinterpreted the railroads' statutory burden of proof in a case where no evidence was submitted to meet their burden, had the power to enjoin the new charges and restore the *status quo*.

2. Whether the Court was correct in holding that the railroads are not relieved from their statutory burden of showing that the combined rates and charges would be just and reasonable because a great number and variety of rates are involved.

3. Whether the continuing existence of certain line-haul rates, prescribed thirty-seven years ago by the Commission and increased by the railroads many times since then, relieved the railroads of their burden of producing evidence of the justness and reasonableness of all the various rates affected by this proposal today.

I.

THE DISTRICT COURT HAD THE POWER TO SUSPEND OR ENJOIN THE NEW CHARGES UPON CONCLUDING THAT THE COMMISSION'S APPROVAL, WHICH ALLOWED THEM TO BE IN EFFECT, WAS BASED UPON AN ERRONEOUS INTERPRETATION OF THE RAILROADS' BURDEN OF PROOF.

Both the Commission and the railroads are here making essentially the argument: that Section 15 (7) of the Interstate Commerce Act (49 U.S.C. § 15 (7)) precludes a district court from suspending or enjoining the new charges after reviewing and setting aside a Commission decision that they are just and reasonable and that this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963) so interpreted Section 15 (7). Neither proposition is correct.

Section 15 (7) prescribes seven months as the maximum period during which tariffs proposing changes in rates and charges can be suspended while the Commission is proceeding with its hearing and decision concerning their lawfulness; and it entrusts to the Commission the function of deciding whether that statutory suspension should be exercised. But the suspension power created and occupied by Section 15 (7) by its terms applies only to suspensions "pending such hearing and the decision" of the Commission. This section in no way addresses itself to or circumscribes the power of either the Commission or the courts to suspend, enjoin, defer or otherwise preclude the assessment of the new rates and charges after the "hearing and the decision" by the Commission. Thus, assuming that Section 15 (7) completely controlled the suspension of rates and

charges during the period while this case was heard and an administratively final decision was being issued by the Commission, by its own terms it clearly does not purport to prescribe or control the power to suspend rates and charges after the Commission's decision, as was here done by the Court below.

The Commission's argument evidences an utter misconception of the nature of Section 15 (7) proceedings. It argues that at this stage "the new charges have by no means been adjudged unlawful" and, therefore, no tribunal, either Commission or court, has the power under the "statute [Section 15(7)]" to prevent the assessment of "the new charge unless and until it is finally adjudged unlawful" (Com. J.S. pp. 9-10). But Section 15(7) does not require an affirmative finding that the rates are "unlawful" before the power ripens to proscribe the continued assessment of the rates. It specifies rather that where, as here, a "change" in rates and charges is involved, there shall be a "hearing" at which "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . [or] charge . . . is just and reasonable." In case initiated under Section 15(7) the Commission concludes after the hearing either that the proposed rates and charges "have been shown to be just and reasonable" or simply that they "have not been shown to be just and reasonable" and are ordered canceled.* The Commission itself has thus consistently recognized that the finding of a failure to meet the burden of proof by the carriers, rather than a positive showing of unlawfulness, is all that Section 15(7) requires to ripen the power to render the rates ineffective.

Here, the Commission had held the full hearing granted by Section 15(7) and had issued an administratively final

* See, for example, *Demurrage Rules and Charges, Nationwide*, 339 I.C.C. 655, 668 (1971), and similar conclusions in like cases at 339 I.C.C. 500; and 337 I.C.C. at pp. 35, 516, 541, 782 and 806.

decision on September 21, 1971 that the charges were shown to be just and reasonable. The Court set aside that conclusion because the Commission erroneously construed the type of proof in this kind of case and the carriers had not submitted the evidence required to meet that burden. As a result, the Court has concluded that the railroads did not meet their burden of proof at the hearing and has implemented the relief precisely appropriate in a case, as here, where the carriers failed to meet their burden of proof in a hearing conducted under Section 15(7). The Court was not required to find the rates and charges unlawful. Under Section 15(7) a conclusion of failure to meet the burden of proof is all that is required as a predicate for ordering the rates out of effect. Since the carrier did not meet the burden of proof, the Commission was required by statute to order the carriers to cease and desist from further collecting the changed rates and charges; and the Court, which so corrected the Commission's decision, had the power to order the same relief, without prejudice to a possible future order of the Commission based upon a lawful finding that the burden has been met after further hearing.

The timetable in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), was crucially different from that involved here. At the time the injunctive relief was sought in *Arrow* the Commission's seven month-suspension period had elapsed and the Commission had not as yet reached a decision. This Court there stated the issue before it as:

> The problem [is] . . . whether the application of new rates might be stayed pending decision [by the Commission] as to their lawfulness. (p. 663).

Then, reasoning that multiple individual court actions against only certain of the rates and charges involved in a new proposal while pending before the Commission before decision would interfere with the "uniformity" of the

"timing" of rate changes and finding "a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates", this Court held that Section 15 (7) precludes judicial injunction while the Commission has not yet reached its decision (p. 668). In so ruling, however, this Court drew a sharp contrast between the lack of judicial power to enjoin or suspend before an administratively final decision by the Commission, on the one hand and, on the other, the power to grant injunctive relief which it specifically recognized as vesting in the district courts upon review of a Commission decision:

> A court's disposition of an application for injunctive relief [before the Commission has issued a decision] would seem to require at least some consideration of the applicant's claim that the carriers proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.[22] (pp. 669-670).

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[22] Thus we do not reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending

> review of an agency's action through the prescribed statutory channels Cf. e.g. Scripps Howard Radio v. F.C.C., 316 U.S. 4; West India Fruit & S.S. Co. v. Seatrain Lines, Inc., 170 F.2 775; Board of Governors v. Transamerica Corp., 184 F.2 311. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, and has never been recognized in derogation of such a clear Congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.

Thus, rather than presenting a "square conflict" with *Arrow*, as claimed by appellants, the function of the Court below, in reviewing the Commission's administratively final decision, setting it aside, and issuing appropriate injunctive relief was expressly contemplated and approved in the *Arrow* case by this Court.

The power of the courts to issue injunctive relief against new rates and charges after the Commission has reached an administratively final decision has been well recognized in other cases.

In *Ad Hoc Com. on Consumer Protection* v. *U. S.*, 313 F. Supp. 119, 124 (D, D.C., 1970), a three-judge District Court temporarily enjoined increased rates which had gone into effect following the expiration of the statutory suspension period where the Commission had made its investigation under section 15(7) and issued a decision approving the rates. Initially, the judge to whom application had been made for a temporary restraining order had declined to grant it on the basis of lack of jurisdiction, citing *Arrow*. On Appeal, the Circuit Court of Appeals for the District of Columbia remanded the matter to the District Court to convene a three-judge Court to hear the request for injunction and held that the court's power to grant temporary relief was:

> (N)ot limited by *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 US 658, on review of a final order of

> the Commission . . . *Arrow* concerned unwarranted judicial intrusion prior to the exercise of administrative expertise; here the Commission has investigated and approved the tariffs in question and thus has completed its function subject to a possible motion for reconsideration under 49 USC § 17 (1963). The convening judge in exercising his discretion may consider the order of Docket No. 8486 sufficiently final for purposes of *Arrow*. (313 F. Supp., at p. 124)

To the same effect is *Cantlay & Tanzola* v. *U. S.*, 115 F. Supp. 72 (S.D. Cal., 1953). There the court similarly recognized that courts can not suspend or otherwise enjoin rates prior to a decision by the Commission and then upheld:

> the inherent equitable power (of the court), following final hearing and determination of the action, to award injunctive relief "ancillary to setting aside the order of the Commission . . . in order to carry out the purpose of Congress to make the judicial review effective." (citing *Pittsburgh G. W. Va. Ry. Co.* v. *U. S.*, 281 U.S. 479 (1930); *Inland Steel Co.* v. *U. S.*, 306 U.S. 153 (1939); and *Central Kentucky Gas Co.* v. *Railroad Co.*, 290 U.S. 264 (1933).

Thus, appellants claim that there is presented here a substantial question of interpretation of section 15(7) is unfounded; the *Arrow* case not only fails to sustain appellants contention but is directly to the contrary on the issue here raised; and decisions of this and other courts are uniform in upholding the ancillary power of the district courts to issue injunctive relief against rates upon setting aside an agency decision which approved them.

Against this well-founded body of precedent, appellants cite only *National Small Shipments Traffic Conference, Inc.* v. *U. S.*, 321 F. Supp. 500, 515 (S.D.N.Y. 1970). There, without citing any reasons or precedent (other than *Arrow*, which it recognized as distinguishable), that court negated

the judicial power to enjoin rates after a final Commission decision. But the statements there concerning the power of courts to enjoin rates were *dicta*, inasmuch as that court had only been asked to "permanently enjoin the Commission's order"* and had not been asked to enjoin the rates (p. 513). Thus, the comments in *National Small Shipments* concerning lack of judicial power to enjoin rates upon setting aside a Commission decision represent an excursion into a point which was not raised for its decision and which had neither been briefed nor argued by the parties. While the distinction can also be drawn that there the carriers were not parties to that case and were beyond the court's jurisdiction, the *dictum* in *National Small Shipments* on the judicial power to enjoin rates was clearly wrong and directly contrary to the rule of law as correctly acknowledged by this Court and followed consistently in the decisions cited *supra*.

The wisdom of the rule of law is well illustrated in the instant case. Here the railroads were admittedly seeking to establish a penalty charge for the express purpose of imposing an absolute barrier against grain inspection and thereby destroying the grain marketing system and injuring small businesses engaged in selling inspected grain. If the Court below had simply remanded the matter to the Commission, allowed the charges to remain effective and the Commission elected to hold a further hearing to give the railroads a fresh chance to present evidence they eschewed at the first hearing, the mere passage of time

*A "permanent injunction" would be inimical to a remand and would effectively terminate the entire litigation. In the instant case the court below has remanded the case to the Commission for further proceedings and, in so doing, its action is consistent with the holding in *National Small Shipments* on the issue raised there.

would allow the railroads to accomplish their objective regardless of the ultimate outcome of the case. A period of two to four years normally passes before the Commission issues a decision after remand in cases where further hearings are held. If the Commission were to hold that the railroads again had not sustained the burden of proof as interpreted by the Court below, there would be no "refunds" possible to those most injured by the continuing effectiveness of the rates, i.e., those precluded from inspections by the economic barrier of the charge. The gravity of the situation can be readily perceived from the fact that, during the first six months of their existence, these penalty charges were so effective that the frequency of inspections had already dropped from 60 percent of the cars to only 25 percent (footnote p. 8 of Railroads J.S.).

Moreover, on those cars on which inspections are being made and charges paid by the shippers, the buyer deducts the penalty charge from the payment to the farmer and, since he is not the shipper-payer of the charges, the farmer would not receive the putative refunds from the railroads.

Under the circumstances presented, the remedy for the Court below, sitting as a court of equity, was clear. If as we insist, the Court was correct in holding that the railroads had failed to meet their statutory burden of proof, the Court properly granted the relief which the Commission was obliged to grant in the case had it applied the correct burden of proof, i.e., cancellation of effectiveness of the tariffs. To be sure, under such circumstances the Commission, upon its own election or upon petition of the carriers, could afford the railroads a further hearing at some future date to give them an opportunity to submit the type of evidence necessary to meet their burden. But this

avenue would be available whether the Commission itself had found the failure to meet the burden or, as here, the Court first discerned the failure. But in either event the railroads had rested their case, an administratively final decision had been reached and they had failed to meet their burden. In either case, whether the Commission had properly concluded there was a failure of proof or whether the Court had to make that legal conclusion for it, the remedy indicated is the same, i.e., the rates must not remain in effect because the railroeds failed to show that they are just and reasonable.*

II.

THE COURT BELOW APPLIED THE CORRECT STATUTORY INTERPRETATION IN SETTING ASIDE THE COMMISSION'S DECISION.

The Commission does not challenge the merits of the opinion of the Court below in setting aside its finding that the railroads had shown their proposal to be just and reasonable. This should be sufficient indication that there is no substantial question as to the correctness of the Court's decision.

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* Indeed, a few weeks after the remand in the *National Small Shipments* case the Commission itself entered a brief order directing immediate cancellation of the rates (then in effect) for the given reason that the court had found the carriers failed to meet their burden of proof; and provided for a further hearing. In order to give solace to the railroads here, the Commission is arguing from *Arrow* that after remand neither the courts nor the Commission has the power to suspend or enjoin rates beyond the section 15(7) seven month-period, despite the fact that it has exercised this power itself. But Commission recognition that section 15(7) in no way circumscribes the remedy available after hearing and decision is implicit in its own post-remand order in *National Small Shipments*.

The railroads assert that the Court below erroneously interpreted the statutory requirements of proof in a case where the proposal involved would create a new charge for a service already provided and compensated under the existing linehaul rates. The Court held that under these circumstances the railroads' burden of proof* required showing that the linehaul rates plus the additional new charge would *in toto* be just and reasonable; and further held that the Commission had misinterpreted the statutory requirements here by concluding that, because of the difficulty of presenting such evidence in a case of broad impact involving thousands of rates, the railroads were not required to meet that statutory burden.

The short answer to the railroads' assault on the merits of the opinion of the Court below is that it is the well settled statutory interpretation that, where a new charge would be imposed in addition to linehaul rates already embracing the service involved, the carriers must show by evidence that the combined total charge would be just and

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* Section 1(5) of the Interstate Commerce Act [49 U.S.C. § 1(5)] provides that:

> all charges made for any service rendered or to be rendered in the transportation of passengers of property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

And Section 15(7) of that Act [49 U.S.C. § 15(7)] provides that in cases where carriers propose to "change" their rates and charges:

> the burden of proof shall be upon the carrier to show that the proposed changed rate, charge, . . . or practice is just and reasonable.

Here, the railroads proposed to change the charge for the complete service by imposing an additional charge, thus placing in issue the reasonableness of the changed total charges.

reasonable. In *Secretary of Agriculture* v. *U.S.*, 347 U.S. 645, 654, this Court, in setting aside the Commission's decision noted the "prevailing rule" with approval that a service encompassed by the linehaul rate cannot be separately restated without examining the sufficiency of the linehaul rate to cover it. That statutory interpretation has since been adhered to consistently by the Commission and the courts, most recently in *Transit Charges, Southern Territory,** 332 ICC 664 (1968), order sustaining in *Cin. N.O. & T.P.R. Co.* v. *U.S.* (unreported) (S.D. Ohio, 1970), aff'd *per curiam* 400 U.S. 932 (1970).

In the instant case the railroads stipulated that the linehaul rates had been so made over the years as to include specifically compensation for the cost of the inspection service. That is the reason why they never even essayed to prove that the total of such line-haul rates and the additional charge would be just and reasonable; or that the line-haul rates, if restricted to cover less than the full services which they embraced, would nevertheless be just and reasonable. They now argue that this utter failure of proof on their part was somehow excusable here, not because they have a statutory exception to that burden in hard cases** (as the Commission found), but because the evidentiary burden was assertedly rendered inapplicable

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* The Commission there held:

The reasonableness of the proposal cannot be properly determined herein without reference to and consideration of, the linehaul rates, the services furnished thereunder, and the cost thereof.

** What is required in cases where thousands of rates are involved is "typical evidence" and not a complete presentation as to all or even as to most rates. *New England Divisions Case*, 261 U.S. 184, 197.

here because the Commission found that they were not proposing to add the charge onto any of those crates which were held to be a maximum level by the Commission in 1935.

Thus, the railroads here argue that the Commission's pivotal finding that they were not required to meet their burden of proof because of the number and variety of grain rates involved was only a "dictum", notwithstanding that the Commission itself regarded that circumstance as "important" (A. 32). They then argue that the Commission's finding that the proposed charge was restricted in such manner that it would not, if added to the rates, combine to exceed the level of the rates prescribed in 1935 in *Grain and Grain Products,* 205 I.C.C. 301, plus all intervening general rate increases was such a distinguishing feature as to relieve them of their burden of proof. The Court below correctly held that this was not such a distinction as to remove the railroads' burden of producing substantial evidence typical in nature to show that the combined line-haul rates and charges and the line-haul rates minus the service previously covered would be just and reasonable. That statutory burden of evidentiary proof is not rendered inapplicable to this situation merely because the resultant rates and charges would not exceed certain rates (1) prescribed over 35 years ago; (2) conceded by the railroads to be "paper rates" which have been kept in their tariffs but move no traffic; (3) increased over 100 percent above the rates prescribed in the 1935 decision; and (4) bearing no demonstrated relationship or resemblance to the somewhat lower rates on which the grain traffic actually moves to-

day.* The Court below correctly held that, in a case where there is a statutory burden of producing evidence of justness and reasonableness, the Commission must require and consider substantial and current evidence as to the rates actually moving the traffic and can not satisfy that burden by the spectre of a 35 year-old ghost.

For the reasons above stated, the order of the district court should be affirmed.

Respectfully submitted,

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* The Commission has frequently recognized that where a lower level of rates has supplanted a maximum level authorized at some time in the past, the new level is the standard which must be applied in determining whether rates exceed a just and reasonable level. *Sugar from Gulf Coast Port groups to Northern Points*, 220 I.C.C. 623 (1937), 234 I.C.C. 247 (1939); *Geo. A. Hormel and Company* v. *Atchison, T. & S. F. Ry. Co.*, 263 I.C.C. 9 (1945); and *French Lick Springs Hotel Co.* v. *Chicago, I. & L. Ry. Co.* v. *Atchison, T. & S. F. Ry. Co.*, 298 I.C.C. 765, 771-72 (1956).

APPENDIX

APPENDIX I

BOARD OF TRADE OF THE CITY OF CHICAGO
THE BOARD OF TRADE OF KANSAS CITY, MO
BUNGE CORPORATION
C-G-F GRAIN COMPANY, INC.
CALIFORNIA GRAIN AND FEED ASSOCIATION
CASH GRAIN ASSOCIATION OF THE CHICAGO BOARD OF TRADE
THE DENVER GRAIN EXCHANGE ASSOCIATION
ENID BOARD OF TRADE
FS SERVICES, INC.
FAR-MAR-CO., INC.
FORT WORTH GRAIN EXCHANGE
GARVEY ELEVATORS, INC.
GARVEY GRAIN, INC.
HOLLANDER & FEUERHAKEN
THE HUTCHINSON BOARD OF TRADE
KANSAS CITY GRAIN COMMISSION MEN'S ASSOCIATION
KANSAS GRAIN & FEED DEALERS ASSOCIATION
LINCOLN GRAIN, INC.
LOS ANGELES GRAIN EXCHANGE
MASTERS GRAIN COMPANY
MERCHANTS' EXCHANGE OF ST. LOUIS
MIDWESTERN GRAIN COMPANY — DIVISION OF GARNAC GRAIN CO., INC.
MISSOURI DEPARTMENT OF AGRICULTURE
MISSOURI FARMERS ASSOCIATION, INC.
MOHR-HOLSTEIN COMMISSION CO.
NATIONAL ASSOCIATION OF WHEAT GROWERS
NATIONAL GRAIN AND FEED ASSOCIATION
NATIONAL GRAIN TRADE COUNCIL
OMAHA GRAIN EXCHANGE
PACIFIC NORTHWEST GRAIN DEALERS ASSOCIATION, INC.

PEORIA BOARD OF TRADE
PRODUCERS GRAIN CORPORATION
ST. JOSEPH GRAIN EXCHANGE
SIOUX CITY GRAIN EXCHANGE
STATE CORPORATION COMMISSION OF THE STA
OF KANSAS
STOTLER & COMPANY
UTAH-IDAHO GRAIN EXCHANGE
THE WICHITA BOARD OF TRADE

TABLE OF CASES CITED

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United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 5

Wirthmore Feeds, Inc. v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745 (W.D.N.Y. 1963) 4

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United States v. *Saskatchewan Minerals*, 385 U.S. 94 (1966) 5

Wirthmore Feeds, Inc. v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745 (W.D.N.Y. 1963) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Nos. 72-214 and 72-433

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al., and INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et al., and SECRETARY OF AGRICULTURE,

Appellees.

On Appeal From The United States District Court For The District of Kansas

REPLY TO MOTIONS TO AFFIRM

I

Without any request by the appellees to grant such relief, without any discussion of its authority to do so, and without any findings to support an injunction, the District Court *sua sponte* ordered that the inspection charges (which had been in effect for over a year and had previously been suspended by the Commission for the maximum seven-month period) "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (App. C7).

Although they did not even see fit to request such relief below, appellees now attempt to reconcile the District Court's asserted power to suspend rates, pending reconsideration by the Commission on remand, with this Court's

clear holding in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963). Appellees contend that *Arrow* is inapplicable once the Commission has issued a decision in the § 15(7) proceeding—"after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion, p. 10).*

The proposed distinction, however, is patently without merit for two reasons: First, the *Arrow* decision is by no means limited to a "primary jurisdiction" test but instead rests on this Court's finding of a congressional intention, based on the statutory scheme and its legislative history, to exclude courts altogether from suspending rates. Second, appellees' argument is self-defeating; for, even assuming *arguendo* that *Arrow* were limited to a "primary jurisdiction" test, as appellees erroneously contend, the District Court's remand of the matter to the Commission "for further proceedings" would have the effect of reopening the § 15(7) proceeding and thereby reinstating the Commission's "primary jurisdiction."

1. Section 15(7) not only specifically limits the suspension period to a maximum of seven months but also expressly provides that "the proposed change of rate . . . shall go into effect at the end of such period."** In *Arrow*, in the

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* The motion to affirm filed by appellees The Wichita Board of Trade, et al., is referred to herein as "Wichita Motion, p. . . ." the motion to affirm filed by the Secretary of Agriculture is referred to as "USDA Motion, p. . . ."

** For the period thereafter, Congress provided two restitution remedies (in addition to judicial review of the Commission order): reparations under § 15(1), and accounting and refund under § 15(7). In this case, a similar accounting and refund procedure was ordered by this Court as part of its order staying the judgment below pending determination of the appeal. (App. F1-2.)

light of the statutory scheme and its legislative history, this Court unequivocally held that Congress "meant to *foreclose judicial power to extend that period*" (p. 664) and "to *vest in the Commission the sole and exclusive power to suspend* and to withdraw from the judiciary any pre-existing power to grant injunctive relief" (p. 667). (Emphasis added.) Similarly, the Court pointed out that ". . . [W]e cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head. . . ." (p. 664), and that ". . . [I]t would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive . . . ." (p. 668).

Since the text of the *Arrow* decision is so fundamentally opposed to their proposed interpretation, appellees resort to a search among *Arrow* footnotes for support. (Wichita Motion, pp. 9-10; USDA Motion, p. 10.) Remarkably, they rely on footnote 22 (p. 671), referring to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels." Such decisions have no application to the District Court's decision in this case, which suspended rates that had been in effect over a year, while simultaneously remanding the "matter" to the Commission "for further proceedings"; the injunction was not issued pending judicial review but instead *after* review, pending the remand to the Commission and possibly beyond. Furthermore, the footnote goes on to state that "Such power has been deemed merely incidental to the court's jurisdiction to review final agency action, *and has never been recognized in derogation of such a clear congressional purpose to oust judicial power*

as that manifested in the Interstate Commerce Act."* (Emphasis added.)

As Chief Judge Friendly held in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970): "We see no relevant difference with respect to our power to [suspend rates] in the fact that the Commission here concluded its labors . . . ." In neither situation can a court extend or reinstitute a suspension which has already continued as long as Congress has provided in § 15(7). The broad scope of *Arrow* has been consistently recognized in subsequent reported decisions dealing with the issue. See *National Small Shipments Traffic Conference, Inc.* v. *United States, supra; Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977, 980 (W.D. Wis. 1967); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F.Supp. 745 (W.D.N.Y. 1963); *Port of New York Authority* v. *United States*, 451 F.2d 783, 788 (2d Cir. 1971).**

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* See *Iowa City—Montezuma Railroad Ship. Ass'n* v. *United States*, 338 F.Supp. 1383, 1392 (S.D. Iowa 1972) (*Arrow* footnote 22 "not only provides no comfort for [plaintiff's] position, but appears to significantly undermine it").

** Appellees rely on three cases which they characterize as a "well-founded body of precedent" (Wichita Motion, pp. 10-11; see also USDA Motion, pp. 8-11). Two of the three were decided long before *Arrow*, and in any event did not even pass on the issue. *Inland Steel Co.* v. *United States*, 306 U.S. 153 (1939); *Cantlay & Tanzola, Inc.* v. *United States*, 115 F.Supp. 72 (S.D. Calif. 1953). In *Inland*, the injunction referred to in the opinion did not suspend rates but set aside an ICC order invalidating a tariff providing for a railroad's paying certain allowances; the effect of the court's order, by setting aside the ICC order, was to let the tariff continue in effect (306 U.S. at 155). In *Cantlay*, contrary to the misleading implication of the Wichita Motion (p. 11), the court (115 F.Supp. at 84) expressly declined to pass on the issue later decided in *Arrow*.

The third case relied on by appellees is an unreported order referred to in *Ad Hoc Committee on Consumer Protection* v. *United States*, 313 F.Supp. 119, 124 (D.D.C. 1970). The order, remanding

2. The strained interpretation of *Arrow* advanced by appellees is without support in the *Arrow* rationale, its language, even its footnotes. But, even assuming that there were any possible merit to such an interpretation, it would not help appellees in this case. Contrary to the premise of their argument, the District Court did not suspend the charges pending its review of the Commission's order, but instead suspended the charges *at the conclusion of the review proceeding* while simultaneously *remanding the "matter" to the Commission "for further proceedings."* Thus, the appellees' argument that courts may suspend "after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion, p. 10) has no application here since the decision they seek to have affirmed would return the case to the Commission's primary jurisdiction.

"[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). See also *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145 (1940); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966). Furthermore, ". . . all matters of administrative discretion remain open for determination on remand after reversal . . . ." *Federal Communications Commission* v. *Pottsville Broadcasting Company, supra*, at 146.

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the case to the District Court from the Court of Appeals, was entered in emergency session by a two-judge panel, and merely concerned the possible issuance (later granted by the District Court) of a temporary restraining order of twelve days' duration pending immediate review of a Commission order by the District Court. Irrespective of the propriety of such a temporary restraining order for that purpose, it scarcely affords any precedent for the decision below suspending the rates *after* judicial review.

In the instant case, by suspending the charges "until and unless otherwise ordered by [the District] Court," the District Court clearly violated these elementary principles of administrative law. The suspension not only invades the Commission's exclusive authority to determine the justness and reasonableness of a rate change and to control "the *timing* of rate changes" (*Arrow*, 372 U.S. at 668), but also the decision would require the Court's permission to put the charges into effect regardless of the Commission's conclusion on remand. When the District Court took upon itself the authority to suspend rates, "it usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co.*, *supra*, at 20.

II

As shown in our Jurisdictional Statement (pp. 13-21), the District Court violated minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings.

In response, the plaintiffs-appellees seek to avoid the issue by the device of reconstructing the decision below. They erroneously attribute to the District Court a ruling that the Commission had misinterpreted the statutory requirements of § 15(7). (Wichita Motion, pp. 14-17.) But, as the Department of Agriculture acknowledges in its motion (pp. 4-6), the decision below was not based at all on the Court's interpretation of § 15(7) but rather the alleged inadequacy of the Commission's explanation of its decision.

More specifically, as examination of the Court's opinion readily confirms (App. C3-7), the decision below was based entirely on the Court's dissatisfaction with one of the two reasons cited by the Commission for distinguishing a prior Commission decision. Though purporting to follow *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), the District Court seized upon the Commission *dictum*, ignored the Commission's principal findings, and made no effort to evaluate the findings "taken as a whole"

(347 U.S. at 651). The plaintiffs-appellees (Wichita Motion, p. 17) characterize the *dictum* as the "Commission's pivotal finding" notwithstanding the Commission's omission of the point from its "chief subsidiary findings" (App. A51) and the Commission's express reliance instead on a "more significant distinguishing feature" (App. A32-33, A51).

In its "chief subsidiary findings", the Commission expressly distinguished the prior decision, *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968) but did so on a wholly different ground. In *Transit Charges*, the Commission had found that "the imposition of the proposed additional $22.00 per car may well result in rates and charges which exceed reasonable maxima" (332 I.C.C. at 686); in the instant case, by contrast, the Commission found (App. A51):

> "Pursuant to orders of the Commission in Docket No. 17,000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the linehaul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory*, supra."

Thus, in accord with its own rulings in prior cases,* the

* As we have noted in our Jurisdictional Statement (p. 17), administrative agencies are not rigidly bound by the doctrine of *stare decisis* and are free to adopt new procedures and solutions when dealing with matters within the scope of their expertise. It is nevertheless significant that the procedure which the Commission utilized in the instant proceeding is entirely consistent with the so-called "established rule" of prior Commission decisions set forth in the USDA Motion (p. 5, quoting from *Reconsignment Case No. 3*, 53 I.C.C. 455 (1919)), requiring *"taking into consideration . . .* the entire through service . . . and the compensation heretofore received for such service." (Emphasis added.)

Commission determined that the applicable tariffs were structured so that a combination of the inspection charge and the existing line-haul rate would in no case exceed the maximum rate level now in effect. This determination was plainly a valid exercise of the Commission's authority under § 15(7), especially in view of the limited scope of a § 15(7) proceeding. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943).

The Commission also reaffirmed the current vitality of the maximum rate level, stating (App. A33):

> "There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products*, 298 I.C.C. 261 (1956), the Commission, while vacating prior orders in Docket No. 17,000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.*, 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. *The Docket No. 17,000, Part 7, prescribed rates, as increased through the subsequently authorized general increases,*

are a currently effective maximum rate level for the movement of these commodities." (Emphasis added.)

The plaintiffs-appellees (Wichita Motion, pp. 17-18; see also USDA Motion, pp. 6-8) now criticize the Commission's reliance on the adjusted Docket 17,000 rates;* but yet they themselves, in a related lawsuit attacking the tariffs here in issue, recognized the present applicability of those rates and contended (albeit erroneously) that "[the] subject tariffs would also result in charges which exceed those which these railroads are required to observe as a maximum under the Commission's outstanding orders in its Docket 17,000, Part VII."**

Not surprisingly, appellees would have this Court completely ignore the Commission's detailed findings, pursuant to §15a(2), concerning the impact of the inspection charges on the national freight car shortage (App. A34-42, A49-51, A53-57). Summarizing these findings, the Commission stated in its "chief subsidiary findings" that "The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement

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* In the USDA Motion p. 6, reference is made to the rate from Williston, North Dakota to Minneapolis, Minnesota. It is true that by May 4, 1971, when the challenged tariffs became effective, the rate was 72.5 cents per hundredweight, due to *ex parte* increases. According to the USDA Motion, p. 6, "This example is representative." However, contrary to appellees' argument that the Docket No. 17,000 rates are only "paper rates," the currently effective 72.5 cent rate is the maximum Docket No. 17,000 rate; consequently, by the very terms of the challenged tariffs, no additional charge for in-transit inspection is made.

** *Board of Trade of Kansas City, Missouri, et al.*, v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4, filed April 23, 1971 (W.D. Mo.).

of the national freight car supply" (App. A51). This Court has recently recognized the public interest in relieving the "recurring shortage of freight cars available to serve the Nation's shippers." *United States* v. *Allegheny-Ludlum Steel Corp.*, 32 L. Ed.2d 453, 458 (1972). Plainly a significant question is presented for review when a District Court not only violates the most fundamental tenets of judicial review but also totally ignores an agency's carefully considered efforts to deal with a problem of national concern.

For the foregoing reasons and the reasons set forth in our Jurisdictional Statement, it is respectfully submitted that the questions presented by this appeal are substantial and of public importance and that an order noting probable jurisdiction should be entered.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

No. 72-433

INTERSTATE COMMERCE COMMISSION,

Appellant,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

Appeals from the United States District Court for the District of Kansas

BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

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IN THE

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BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

OPINIONS BELOW

The opinion of the District Court is not yet reported. The opinion of Division 2 of the Interstate Commerce Commission is reported at 339 I.C.C. 364 (1971), and was affirmed by the Commission *en banc* in an opinion reported at 340 I.C.C. 69 (1971). Copies of the opinions of Division 2, the Commission *en banc,* and the District Court are set forth in the Appendix, pp. 6, 64, and 100, respectively.[1]

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[1] Pages of the Appendix are cited herein as, e.g., "A. 23".

JURISDICTION

The opinion of the three-judge District Court, convened pursuant to 28 U.S.C. §§ 2325 and 2284, was issued on May 24, 1972. On June 8, 1972, the District Court denied a motion to correct the opinion and entered judgment. On June 9, 1972, appellants in No. 72-214 filed their notice of appeal, and on July 19, 1972, the Interstate Commerce Commission filed its notice of appeal in No. 72-433. On November 13, 1972, this Court noted probable jurisdiction in both appeals. The jurisdiction of this Court to review the District Court's decision on direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). E.g., *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

QUESTIONS PRESENTED

1. Does a District Court have jurisdiction to suspend railroad rates which the Interstate Commerce Commission had previously suspended for the maximum period provided for by the statute and had found to be just and reasonable?

2. Did the Court below violate minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings?

3. Where the Commission specifically found that the proposed charges when added to the existing line-haul rates do not exceed the maximum reasonable level, found that the accessorial service for which the charges will be made is no longer necessary to the orderly marketing of the commodity, and found that the proposed charges will make a substantial contribution toward alleviating the serious nationwide shortage of freight cars, was the Court below correct in remanding the matter to the Commission because the Commission did not require specific evidence of reve-

nues, costs, and services as to the thousands of individual line-haul rates involved?

STATUTES INVOLVED

Section 15(7) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to

keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Section 13(1) of the Interstate Commerce Act as amended, 49 U.S.C. § 13(1), provides:

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable

ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(1) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(1), provides:

> Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property, as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsoever of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

STATEMENT

This case arises out of a rate suspension proceeding conducted by the Interstate Commerce Commission under § 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7) (*supra*, pp. 3-4), and involving new or increased charges for in-transit grain inspection services. The charges were proposed by the Nation's railroads[2] for the purpose of discouraging in-transit inspections and thereby alleviating the serious nationwide freight car shortage.

Pending investigation and hearing, the charges were suspended by the Commission for the maximum statutory seven-month period, which was voluntarily extended by the railroads for an additional six months, and then were put into effect by the carriers. The Commission found that the charges were just, reasonable and otherwise lawful and would "make a substantial contribution toward the improvement of the national freight car supply" (A. 56).

An action to review the Commission's order was brought in the District Court by the appellees, consisting principally of certain grain dealers and exchanges. The Court remanded the matter to the Commission for further proceedings and *sua sponte* suspended the charges which had been in effect for over a year (A. 106).

Thereafter, this Court entered an order staying the District Court's judgment pending determination of this appeal (A. 111).

1. In-Transit Grain Inspection

The in-transit inspection of railroad grain shipments requires stopping the loaded railroad cars enroute, switch-

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[2] The appellant railroads, which operate in the Western District of the United States, are listed in the Appendix, p. 115. No judicial review has been sought as to the charges proposed by eastern and southern railroads.

ing them to separate track facilities where they are held for sampling and grading of the grain, awaiting disposition orders from the shippers after inspection, and switching the cars back into line-haul movement (A. 9). This interruption in the line-haul resulting from in-transit inspection amounts to an average delay of more than three days per inspection (A. 102, 39-47, 53).

This delay can be avoided (1) by having the shipment inspected at point of origin, (2) by having the shipment inspected at destination, or (3) by by-passing the inspection process altogether. However, prior to the filing of the challenged tariffs, "it has been convenient for grain shippers and receivers to have the grain inspected while in transit" (A. 17).

Prior to 1968, inspection of interstate grain shipments was required by federal law (United States Grain Standards Act, 7 U.S.C. § 71 *et seq.*) to determine the official grade of the contents. But in 1968 Congress repealed this inspection requirement (P.L. 90-487, 82 Stat. 761). After a careful review of the statute and its legislative history, the Commission (A. 16) found "that improved car utilization in the movement of whole grain by railroad was a consideration in the revision." The Court below (A. 101) stated, even more emphatically, that "[t]he primary purpose of the Congress was to effect an increased utilization of rail cars."

However, despite the repeal of the inspection requirement and the increasing availability of alternate sampling methods (including the use of recently developed automatic samplers at origin or destination), in-transit grain inspections continued in large numbers. In 1968, there were 464,000 in-transit inspections on 16 western railroads; in 1969, 488,000 on 15 western railroads (A. 10). During this period there also continued to be a nationwide shortage of

freight cars which became critical during grain harvest periods (A. 54).

2. The Challenged Tariffs

Faced with this shortage, and in order to reduce the number of in-transit inspections and thereby improve car utilization, the railroads filed schedules with the Interstate Commerce Commission (to become effective March 28, 1970) proposing new or increased charges of approximately $13.50 per car for the first in-transit inspection of grain.[3]

The eastern railroads, which have been making separate charges for this service since 1963, proposed to increase their inspection charges (A. 14, 35). These increased charges by the eastern railroads have not been judicially contested and are not involved in this appeal.[4]

The appellant railroads, which operate in the Western District of the United States and had previously (with some exceptions[5]) provided the service without a separate charge, proposed to institute separate charges for the first in-transit inspection. In this respect, the challenged tariffs place the western railroads on a parity with eastern railroads.

The tariff charges apply only to grain shipments inspected while in-transit. Thus, any additional charge can

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[3] The current charge is approximately $17.00 as a result of subsequent general revenue increases. Even before the instant Commission proceeding, all railroads had charged for the second and subsequent in-transit inspections (although in some instances a second free inspection was permitted at destination in lieu of reconsignment) (A. 16-17).

[4] With respect to movements within the South, the establishment of a separate charge for the inspection service was unopposed even at the Commission level (A. 35).

[5] See, e.g., *Grand Forks Chamber of Commerce* v. *Great Northern Railway Company*, 321 I.C.C. 356 (1963).

be avoided by any grain shipper who elects to have inspection made either at origin or destination on private tracks (or who elects to have no inspection at all) (A. 18-19).

In any event, even as to those shippers who insist on in-transit inspection, the tariffs provide that the inspection charges when added to the line-haul rates cannot exceed the maximum reasonable level of rates on grain in the West established by the Commission. These maxima were first determined by the Commission in two general investigations reported in *Grain and Grain Products*, 205 I.C.C. 301 (1934) and 215 I.C.C. 83 (1936) (referred to as Docket No. 17000, Part 7), and since then have been readjusted through subsequent general rate increases and subjected to continual Commission review (A. 38).

3. The Commission Proceeding

In response to protests filed by certain of the appellees and others, the proposed charges were suspended by the Commission pursuant to § 15(7) for the statutory seven-month period, which the appellant railroads voluntarily extended for an additional six months.

(a) Division 2's Decision

On April 16, 1971, Division 2 of the Commission issued its decision finding the proposed charges just, reasonable and otherwise lawful, based on the following "chief subsidiary findings" (A. 56):

> "1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standard Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.

"2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

"3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

"4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply."

In addition, each of these "chief subsidiary findings" was supported by detailed supplementary findings:

1. With respect to *the optional character of in-transit inspection under present circumstances,* Division 2 also found that "it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad" (A. 17); that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (A. 18); that "There are numerous shipments of the grain where in-transit inspections are not performed" (A. 18); that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (A. 18); and that such inspection "is an accessorial service for which a charge separate from the line-haul charges may properly be assessed" (A. 19).

2. With respect to *the reasonableness of the aggregate of the proposed charges and the line-haul rates,* Division 2 also reaffirmed the current vitality of the maximum rate level, stating (A. 38):

> "There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products. In *Grain and Grain Products,* 298 I.C.C. 261 (1956), the Commission while vacating prior orders in Docket No. 17000, Part 7, relating to the rates and charges on coarse grains, specifically left standing the requirement for the establishment and maintenance of the maximum reasonable rates. In a report decided in 1964, in *Southeastern Assn. of R. & Util. Commrs.* v. *A., T. & S. F. Ry.,* 321 I.C.C. 519, the Commission relied on the rate factors applicable to the movement of grain within the West in concluding that the rates and method of making rates on grain from, to, and within the South were not shown to be unjust, unreasonable, or otherwise unlawful. In *Grain and Grain Products* (Rate Structure Investigation, Part 7), 329 I.C.C. 824 (1967), the rate structure was again reviewed by the Commission. Furthermore, in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities. The Docket No. 17000, Part 7, [illegible] through the subsequently [illegible] are a currently effective [illegible] movement of these [illegible]

Since this maximum rate [illegible] by the combination of the [illegible] haul rates, Division 2 [illegible] combination.

3. With respect to *the reasonableness of the proposed charges viewed separately,* Division 2 (A. 19-27) summarized elaborate studies demonstrating that the cost of the service exceeded the amount of the proposed charge.

4. Division 2 further stated (A. 54) that, "While we have concluded that the proposed charges are shown to be just and reasonable on the usual basis of review, it is encumbent to consider also *the effect of such charges on the national shortage of railroad freight cars*" (italics added).

In this regard, Division 2 (A. 55) found that increased car utilization "was the primary objective of the western railroads in proposing the inspection charge. . . ."; that "[b]ecause of the economic impact of the charges, the approval given herein should accelerate the use of the origin samplers"; and "that the in-transit inspection results in an unwarranted loss of car availability, and the elimination of the service, or any significant portion of it, will materially increase car utilization."

The proposed charges became effective on May 4, 1971.

(b) Decision of the Commission En Banc

On petitions for reconsideration, the Commission *en banc* affirmed the Division 2 decision on September 21, 1971.

The Commission stated (A. 70) that it was "convinced, as was the division, that the respondent railroads are more concerned with increasing utilization of its freight cars than they are in collecting the inspection charge." The Commission, however, retained jurisdiction "to determine upon still further review whether we will require that funds derived from the assessment of the considered charge, or any part thereof, be used to upgrade the fleets of freight cars operated by respondents," and accordingly

ordered the railroads to submit periodic reports showing the amount of revenue derived from the inspection charges (A. 70-71, 72).

(c) Subsequent Reports Filed with the Commission

Pursuant to the Commission's order, the appellant railroads on July 7, 1972, filed their first report with the Commission summarizing the effect of the inspection charges during the first six-month reporting period (October 1, 1971, to March 31, 1972). The report shows that only 25% of the grain shipments on the 17 carriers reporting complete data were inspected in-transit during this period, as compared with 59.8% for the same six months in the year before the inspection charges took effect.

On January 2, 1973, the appellant railroads filed their second report with the Commission summarizing the effect of the inspection charges during the second six-month reporting period (April 1, 1972, to September 30, 1972). The report shows that 24.6% of the grain shipments on the 19 carriers reporting complete data were inspected in-transit during this six-month period—notwithstanding the fact that the challenged tariffs were inoperative from June 8 to July 7, 1972, by reason of the District Court's suspension order prior to the stay granted by this Court.

The impact of the tariffs is further shown by comparing the statistics with respect to April 1971, the last calendar month before the charges were placed in effect, and April 1972, after the charges became effective. The report shows that the percentage of in-transit inspections was reduced from 52.6% in April 1971 to 21.5% in April 1972.

Copies of the two reports have been lodged with the Clerk of this Court.

4. The District Court Proceeding

(a) Nature of the Action

Plaintiffs-appellees Wichita Board of Trade, et al. (less than a third of whom participated in the Commission proceeding) filed the action on November 8, 1971, in the United States District Court for the District of Kansas pursuant to 28 U.S.C. § 1336 to enjoin the order of the Commission with respect to the inspection charges instituted by the western railroads.[6] Judicial review was not sought as to the new or increased charges instituted by the southern and eastern railroads.

Appellant railroads intervened in support of the Commission's order, and appellee Secretary of Agriculture intervened in support of plaintiffs' complaint. In accordance with 28 U.S.C. § 2325, the case was heard by a three-judge court.

(b) Relief Granted

In its decision rendered May 24, 1972, the District Court ordered the matter "remanded to the Commission for further proceedings consistent with this opinion" (A. 106). In addition, although none of the appellees had even requested such relief, the District Court ordered that the in-

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[6] In an earlier related case, filed after the Division 2 decision but before the tariffs became effective, essentially the same group of plaintiffs-appellees sought to enjoin the carriers from putting the tariffs into effect on the ground (*inter alia*) that "[the] subject tariffs would also result in charges which exceed those which these railroads are required to observe as a maximum under the Commission's outstanding orders in its Docket 17000, Part VII." *Board of Trade of Kansas City, Missouri, et al.* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4, filed April 23, 1971 (W.D.Mo.). The District Court denied the requested preliminary injunction, and the action was then dismissed by agreement of the parties.

spection charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (A. 106).

(c) Opinion Below

The District Court appears to have sustained the Commission's principal findings. The Court stated (A. 101-102):

> "After extensive hearings the Commission found that: (1) the proposed charges do not apply in any instance where applicable line-haul rates plus the charge would exceed the maximum reasonable rates set forth in Grain and Grain Products, 205 I.C.C. 301 (1934), 215 I.C.C. 83 (1936), (2) inspection of grain is no longer a mandatory requirement of federal law, (3) there is a need for inspection at some point in the grain marketing process, but inspection in-transit is not essential, and (4) grain inspection in-transit is an "accessorial" service for which a charge separate from the basic line-haul charges may be properly assessed. The Commission then found that the proposed charges were just and reasonable in that the railroads established by substantial evidence that the costs associated with in-transit inspection correspond to the level of the proposed charges and that delays resulting from in-transit inspection amount to more than three days per car. There is substantial evidence in support thereof."

The Court objected, however, to a short paragraph in Division 2's 43-page decision in which the Division—referring to a subordinate alternative ground for distinguishing a prior Division opinion[7] (and although then expressly relying on a "more significant distinguishing feature that persuades us that the prior decision is not controlling here")—commented on the impracticality of requiring detailed analysis of every line-haul rate involved (A. 37). On the basis of

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[7] *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968), sustained on other grounds in *Cin. N. O. & T.P.R. Co.* v. *United States* (unreported) (S.D. Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970).

this single statement, the District Court concluded that ". . . the Commission has not adequately explained, for purposes of our review, its departure from prior norms" (A. 105). According to the Court (A. 104-05):

> "In effect, the Commission 'excuses' the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers 'inability' to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are 'able' to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible."
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> "The Commission in the case at bar did not 'explain its departure' from its prior norm by its contention that this case can be 'distinguished' on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se. . . ."

(d) Subsequent Proceedings

Appellants filed motions for correction of the District Court's opinion, contending that the Court had exceeded its authority by suspending the charges. On June 8, 1972, the Court denied the motions (A. 107-08); and on June 19, 1972, the Court denied the appellant railroads' motion for stay of judgment pending appeal to this Court (A. 4).

5. The Stay Order

The appellant railroads thereafter applied to this Court for stay of the District Court's judgment on the ground that

the District Court's suspension of the inspection charges was beyond its jurisdiction and would result in a serious shortage of freight cars causing substantial and irreparable injury to the public, the grain industry, and the railroads. On July 7, 1972, this Court entered an order, subject to an accounting and refund condition, staying the judgment of the District Court pending determination of this appeal (A. 111-12).

ARGUMENT

INTRODUCTION AND SUMMARY

Underlying each of the questions presented by this appeal is the improper interference by the Court below with the powers and responsibilities of the Interstate Commerce Commission to determine the reasonableness of rates and to deal with other matters of vital importance to the national transportation system—specifically the "recurring shortages of freight cars available to serve the Nation's shippers." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

In suspending charges which had been in effect for more than a year, the Court below acted beyond its jurisdiction and in square conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963).

The Court below also failed to meet the most elementary standards of judicial review by setting aside the Commission's order on the basis of a *dictum* taken out of context and by ignoring the clearly stated findings of the Commission. The Court further misconceived the function and scope of Commission proceedings under § 15(7), as defined by this Court in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671 (1943).

I.

Section 15(7) not only specifically limits the suspension period to a maximum of seven months but also expressly provides that "the proposed change of rate . . . shall go into effect at the end of such period." In *Arrow*, in the light of the statutory scheme and its legislative history, this Court unequivocally held that Congress "meant *to foreclose judicial power to extend that period*" (372 U.S.

at 664) and *"to vest in the Commission the sole and exclusive power to suspend* and to withdraw from the judiciary any pre-existing power to grant injunctive relief" (p. 667). (Italics added.)

The appellees nevertheless seek to distinguish *Arrow* on the ground that a court may suspend rates "after the primary jurisdiction of the . . . Commission has been exhausted." This proposed distinction conflicts with the express rationale of *Arrow*, as Chief Judge Friendly held in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970). The proposed distinction is furthermore inapplicable to the facts of this case, since the District Court's decision on the merits —remanding the case to the Commission for further proceedings under § 15(7)—necessarily reinstated the Commission's "primary jurisdiction."

Accordingly, the District Court's order suspending the charges "until and unless otherwise ordered by [the District] Court" invaded the Commission's exclusive authority to suspend rates and determine the reasonableness of a rate change and also "usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952).

II.

In addition, the District Court violated minimal standards of judicial review by basing its decision on a *dictum* in the Commission's opinion and disregarding the Commission's findings.

Instead of considering the Commission's "report, read as a whole," *United States* v. *Louisiana*, 290 U.S. 70, 80 (1933), the District Court confined its analysis to a subordinate ground cited by the Commission for distinguishing a prior Commission decision. On this basis, the Court er-

roneously attributed to the Commission a wholly nonexistent "evidentiary rule which is discriminatory per se." The Commission's decision and especially its "chief subsidiary findings" clearly demonstrate the District Court's total failure to deal with what the Commission actually decided.

The Commission not only found that in-transit inspection was an optional accessorial service under present conditions—particularly since the 1968 amendment to the Grain Standards Act—but also made detailed findings sustaining the reasonableness of the aggregate amount resulting from the combination of the inspection charges and the present line-haul rates. The Commission did not "depart" from any "norm"; and indeed its decision is entirely in accord with each of the decisions relied upon by the District Court to show such a "departure."

The Court below further failed to consider "the unique circumstances of this case." *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652 (1954). As the Commission found, the primary purpose of the challenged tariffs was to increase car utilization; and, as subsequent experience has demonstrated, the tariffs have already in large measure achieved that purpose.

I. THE ORDER OF THE COURT BELOW SUSPENDING THE CHARGES WAS BEYOND ITS JURISDICTION.

Section 15(7) (*supra*, pp. 3-4) authorizes the Commission under certain conditions to suspend the operation of a railroad's newly filed schedule of charges "but not for a longer period than seven months beyond the time when it would otherwise go into effect." In addition, § 15(7) spe-

cifically provides that "the proposed change of rate . . . shall go into effect at the end of such period."[8]

Pursuant to § 15(7), the challenged tariffs were suspended by the Commission for the maximum seven-month period (which the railroads voluntarily extended for an additional six months) and were then put into effect by the carriers. After the rates had been in effect for more than a year, the District Court decreed that the charges "are suspended and shall be ineffective until and unless otherwise ordered by [the District] Court" (A. 106). The Court took this action *sua sponte* without any request to grant such relief, without any discussion of its authority to do so, and without any findings to support an injunction.[9]

A. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THIS COURT'S ARROW DECISION.

In *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), this Court held that § 15(7) withdrew from the courts any power to suspend rates or to extend the maximum suspension period provided by the statute. In rejecting an attempt to enjoin carrier-initiated rates which (like the charges in the instant case) had been suspended for the statutory seven-month period, this Court stated:

> ". . . we cannot suppose that Congress, by vesting the new suspension power in the Commission, intended to

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[8] For the period thereafter, Congress provided two restitution remedies (in addition to a proceeding under § 15(1), *supra*, p. 5): a proceeding under § 13(1) (*supra*, pp. 4-5) and accounting and refund under § 15(7). In this case, a similar accounting and refund procedure was ordered by this Court as part of its order staying the judgment below pending determination of the appeal (A. 111-12).

[9] See Rule 65(d), F.R.Civ.P.: "Every order granting an injunction . . . shall set forth the reasons for its issuance. . . ."

give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head.

"Moreover, Congress engaged in a protracted controversy concerning the period for which the Commission might suspend a change of rates. Such a controversy would have been a futile exercise unless the *Congress also meant to foreclose judicial power to extend that period.*" 372 U.S. at 664 (italics added).

• • •

"We cannot believe that Congress would have given such detailed consideration to the period of suspension unless *it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief.*" Id. at 667 (italics added).

• • •

"There is, of course, a close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates, a jurisdiction to which this Court had, even in 1910, already given the fullest recognition. Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 51 L.Ed. 553, 27 S. Ct. 350. This relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive." Id. at 668 (footnote omitted).

The power which the District Court in this case purported to exercise is precisely the power which this Court held in *Arrow* was withdrawn by Congress from the judiciary. Thus, the District Court's action not only conflicts with *Arrow* but also is patently beyond the jurisdiction of any federal court.

B. THE COMMISSION'S PRIOR RULING DID NOT RESTORE JUDICIAL POWER TO SUSPEND RATES, PARTICULARLY ON REMAND TO THE COMMISSION.

Although they did not even see fit to request such relief below, the appellees now seek to justify the District Court's action by attempting to distinguish *Arrow*. The appellees contend that *Arrow* is inapplicable once the Commission has issued a decision in the § 15(7) proceeding—"after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion to Affirm, p. 10).

The proposed distinction, however, is patently without merit for two reasons: First, the *Arrow* decision is by no means confined to a "primary jurisdiction" test but instead rests on this Court's finding of a congressional intention, based on the statutory scheme and its legislative history, to exclude courts altogether from suspending rates. Second, appellees' argument is self-defeating; for, even assuming *arguendo* that *Arrow* were limited to a "primary jurisdiction" test, as appellees erroneously contend, the District Court's remand of the matter to the Commission "for further proceedings" would have the effect of reopening the § 15(7) proceeding and thereby reinstating the Commission's "primary jurisdiction."

1. The Arrow Decision Bars the Judicial Suspension of Rates Regardless of the Stage of the Commission Proceeding.

Section 15(7) not only specifically limits the suspension period to a maximum of seven months but also expressly provides that "the proposed change of rate . . . *shall go into effect at the end of such period.*" (Italics added.) In *Arrow*, in the light of the statutory scheme and its legisla-

tive history, this Court (as already noted, *supra*, p. 21-22) unequivocally held that Congress "meant *to foreclose judicial power to extend that period*" (p. 664) and *"to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief"* (p. 667). (Italics added.) Nothing in the *Arrow* decision even remotely suggests that the issuance of a decision by the Commission would terminate this "sole and exclusive power to suspend" or somehow restore the withdrawn "pre-existing power to grant injunctive relief."[10]

The distinction advanced by the appellees was squarely rejected by Chief Judge Friendly of the Second Circuit, speaking for a three-judge district court in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970)[11]:

> "The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agreement; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. *We see no*

[10] Indeed, in the *Arrow* case, at the time of this Court's decision, Division 2 had announced its decision sustaining the challenged tariffs, and that decision was awaiting possible reconsideration by the Commission. 372 U.S. at 660 footnote 2. The whole thrust of the *Arrow* opinion is flatly contrary to any notion that the injunction remedy prohibited by *Arrow* would suddenly become available as soon as the Commission disposed of the petition for reconsideration.

[11] The case involved the motor carrier counterpart of § 15(7), § 216(g) of the Interstate Commerce Act, 49 U.S.C. § 316(g), containing the same statutory suspension language as § 15(7).

> *relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors* and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. In neither situation can we direct the Commission to reinstitute a suspension which has already continued as long as Congress allows." (Italics added.)

Congress, as both the *Arrow* and *National Small Shipments* decisions recognize, "vest[ed] in the Commission the sole and exclusive power to suspend" (372 U.S. at 667).

Since the text of the *Arrow* decision is so fundamentally opposed to their proposed interpretation, appellees resort to a search among *Arrow* footnotes for support. (Wichita Motion to Affirm, pp. 9-10; USDA Motion to Affirm, p. 10.) Remarkably, they rely on footnote 22 (p. 671), referring to "decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction *pending review of an agency's action through the prescribed statutory channels.*" (Italics added.) Such decisions have no application to the District Court's decision in this case, which suspended rates that had been in effect over a year, while simultaneously remanding the "matter" to the Commission "for further proceedings"; the injunction was not issued pending judicial review but instead *after* review, pending the remand to the Commission and possibly beyond. Furthermore, the footnote goes on to state that "Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, *and has never been recognized in derogation of such a clear congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.*"[12] (Italics added.)

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[12] See *Iowa City—Montezuma Railroad Ship. Ass'n* v. *United States*, 338 F.Supp. 1383, 1392 (S.D. Iowa 1972) (*Arrow* footnote 22 "not only provides no comfort for [plaintiff's] position, but appears to significantly undermine it").

As Chief Judge Friendly held in the *National Small Shipments* case, *supra*, "the fact that the Commission here concluded its labors" is simply immaterial under *Arrow*. In neither situation can a court extend or reinstate a suspension which has already continued as long as Congress has provided in §15(7). The broad scope of *Arrow* has been consistently recognized in subsequent reported decisions dealing with the issue. See *National Small Shipments, supra; Oscar Mayer & Co.* v. *United States*, 268 F.Supp. 977, 980 (W.D.Wis. 1967); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F.Supp. 745, 746 (W.D. N.Y. 1963); *Port of New York Authority* v. *United States*, 451 F.2d 783, 788 (2d Cir. 1971).

2. In Any Event, A Judicial Rate Suspension Is Barred On Remand to The Commission.

The strained interpretation of *Arrow* advanced by appellees is without support in the *Arrow* rationale, its language, even its footnotes. But, even assuming that there were any possible merit to such an interpretation, it would not help appellees in this case. Contrary to the premise of their argument, the District Court did not suspend the charges pending its review of the Commission's order, but instead suspended the charges *at the conclusion of the review proceeding* while simultaneously *remanding the "matter" to the Commission "for further proceedings."* Thus, the appellees' argument that courts may suspend "after the primary jurisdiction of the Interstate Commerce Commission has been exhausted" (USDA Motion to Affirm, p. 10) has no application here, since the decision under review would return the case to the Commission's primary jurisdiction.

"[T]he function of the reviewing court ends when an error of law is laid bare. At that point the matter once

more goes to the Commission for reconsideration." *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952). See also *Federal Communications Commission* v. *Pottsville Broadcasting Company*, 309 U.S. 134, 145 (1940); *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95 (1966). Furthermore, ". . . all matters of administrative discretion remain open for determination on remand after reversal . . . ." *Federal Communications Commission* v. *Pottsville Broadcasting Company, supra*, at 146.

In the instant case, by suspending the charges "until and unless otherwise ordered by [the District] Court," the District Court clearly violated these elementary principles of administrative law. The suspension not only invades the Commission's exclusive authority to determine the justness and reasonableness of a rate change and to control "the *timing* of rate changes" (*Arrow*, 372 U.S. at 668), but also the decision would require the Court's permission to put the charges into effect regardless of the Commission's conclusion on remand. When the District Court took upon itself the authority to suspend rates, "it usurped an administrative function." *Federal Power Commission* v. *Idaho Power Co., supra*, at 20.

II. THE COURT BELOW APPLIED PATENTLY ERRONEOUS LEGAL STANDARDS OF JUDICIAL REVIEW.

The Court below not only intruded into the Commission's exclusive suspension power under § 15(7), but also applied patently erroneous legal standards of judicial review.

As this Court noted in *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942):

> "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the

> resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems."

See also *American Commercial Lines* v. *Louisville & N. R. Co.*, 392 U.S. 571, 590 (1968). Since the reasonableness of a rate is essentially an issue of fact for the Commission's determination, "The judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body." *Mississippi Valley Barge Line* v. *United States*, 292 U.S. 282, 286-87 (1934).

In the instant case, responding "to the dynamic character of transportation problems" (*Board of Trade of Kansas City, supra*), the Commission not only "concluded that the proposed charges are shown to be just and reasonable on the usual basis of review . . ." but also considered "the effect of such charges on the national shortage of railroad freight cars" (A. 54).

Unlike the typical tariffs providing for new or increased charges, the tariffs at issue here are not designed to obtain additional revenue for the carriers but instead to discourage in-transit inspections (each causing a delay of more than three days per car) and thereby achieve better car utilization. This purpose of the tariffs was not only recognized by both Division 2 and the Commission *en banc* (A. 55, 70), but has been confirmed by the reports which the Commission ordered the carriers to file concerning the actual effect of the tariffs in operation. The relative number of in-transit inspections during the first six-month reporting period after the charges became effective was reduced by over 58%: in the second six-month period, only 24.6% of the grain shipments were inspected in-transit

(despite the fact that for approximately one month the tariffs were not in effect because of the District Court's suspension order); and in April 1972, only 21.5% were inspected in-transit (in comparison with 52.6% in April 1971, the last month before the charges went into effect)—a reduction of over 59%. See Statement, ***supra***, p. 13.

Thus, the tariffs are already achieving their purpose; and as the use of alternative sampling methods continues to increase—stimulated by the charges provided in the tariffs—the number of in-transit inspections can be expected to continue to decline, with resulting additional benefits to car utilization. Where alternative sampling methods are used (or inspection avoided altogether), the charges provided in the tariffs are, of course, wholly inapplicable.

In any event, as already noted, the Commission sustained the tariffs "on the usual basis of review" (A. 54). The Commission (A. 56) made four "chief subsidiary findings that lead [it] to the ultimate conclusion that the considered schedules are just and reasonable":

> (1) that in-transit inspection is no longer essential to the orderly marketing of grain;
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> (2) *that the line-haul rates even when increased by the proposed charges do not exceed the maximum reasonable level prescribed by the Commission;*
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> (3) that (based on detailed detention and cost studies) the proposed charges are themselves just and reasonable for the service to be rendered; and
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> (4) that "the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply".

The Court below appears to have sustained these findings (see Statement, ***supra***, p. 15). But the Court then pro-

ceeded, for all practical purposes, to ignore them. Instead, the Court based its entire decision on its dissatisfaction with a Commission *dictum* setting forth a subordinate ground for distinguishing a prior Commission decision.

In its opinion, as distinguished from its "chief subsidiary findings", the Commission noted that its prior decision in *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968),[13] was distinguishable in two respects. Preliminarily, the Commission commented on the impracticality of requiring detailed analysis of every line-haul rate involved.[14]

But the Commission's opinion then states (A. 37-38): "However, there is a more significant distinguishing feature that persuades us that the prior decision is not controlling here"—*i.e.*, "that the line-haul rate applicable to any movement of grain within the West when coupled with

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[13] Sustained, on other grounds, in *Cin. N. O. & T.P.R. Co.* v. *United States* (unreported) (S.D. Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970).

[14] "As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court . . . indicated that the burden of proof required of the respondent railroads was erroneous." (A. 37.) The Commission's language bears a striking similarity to this Court's statement in *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943) (see *infra*, p. 35).

the proposed charge is less than the maximum reasonable level determined by this Commission" and that "In no instance will the combined rate and charge exceed the maximum level prescribed. . . ." In its "chief subsidiary findings," the Commission relied exclusively on this second "more significant" distinction, stating that "Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra*" (A. 56).

The District Court, however, disregarded the Commission's findings and analysis, and instead seized on the Commission's *dictum* as a basis for setting aside the Commission's order. According to the Court's extraordinary reconstruction of the Commission's decision (A. 104-05):

> "In effect, the Commission 'excuses' the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers 'inability' to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are 'able' to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible."
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> "The Commission in the case at bar did not 'explain its departure' from its prior norm by its contention that this case can be 'distinguished' on the apparent proposition that here the railroads were unable to marshal and present substantial evidence to meet the requirements of the norm. The Commission has unwittingly, we believe, adopted an evidentiary rule which is discriminatory per se. . . ."

The opinion below is defective on several grounds:

(A) The District Court's reconstruction of the Commission's decision is plainly erroneous;

(B) Judicial review of the Commission's decision should be based on its report read as a whole, not a *dictum* torn from context; and

(C) The Commission did not "depart" from any "norm."

A. THE DISTRICT COURT'S PURPORTED RECONSTRUCTION OF THE COMMISSION'S DECISION IS PLAINLY ERRONEOUS.

Even the most casual examination of the Commission decision demonstrates that the District Court's restatement of the Commission's position does not even remotely resemble what the agency actually decided.

The Commission did not "excuse" anyone from meeting a requirement; and it did not, unwittingly or otherwise, adopt a "discriminatory" evidentiary rule.

With respect to the *Transit Charges* decision, the Commission—both in its opinion and particularly its findings (see *supra*, pp. 10-12, 29-31)—made it as clear as language will permit that "the more significant distinguishing feature that persuades us" is that the total of the line-haul rate and the inspection charge did not exceed the maximum reasonable level. Indeed, in its "chief subsidiary findings," the Commission did not even mention the *dictum* on which the Court below constructed its entire analysis of the Commission decision.

B. JUDICIAL REVIEW OF THE COMMISSION DECISION SHOULD BE BASED ON ITS REPORT READ AS A WHOLE.

In any event, it is a wholly improper exercise of judicial review to base the Court's decision, not on the agency's findings, but on a *dictum* torn from the context of the agency's opinion. Where, as here, the agency carefully details its findings, surely minimal standards of judi-

cial review require that the reviewing court address itself to those findings—rather than concentrate on a single *dictum* and then, remarkably, set aside the agency's order on the ground that the agency did not adequately explain its decision.

It is elementary that judicial review of a Commission decision must be made on the basis of "the report, read as a whole," *United States* v. *Louisiana,* 290 U.S. 70, 80 (1933); *Alabama Great Southern R. Co.* v. *United States,* 340 U.S. 216, 227-28 (1951); and the Commission's findings "taken as a whole," *Secretary of Agriculture* v. *United States,* 347 U.S. 645, 651 (1954). "The report must be considered in its entirety and not any isolated statements therein." *Akron, Canton & Youngstown Ry. Co.* v. *Hagenbuch,* 128 F.2d 932, 937 (6th Cir. 1942).

In *United States* v. *Louisiana, supra,* a Commission order had been set aside by a three-judge district court—as in this case—because of its objection to a "statement separated from its context in the Commission's report . . ." (290 U.S. at 80). On appeal, this Court reversed, holding that "the report, read as a whole, sufficiently expresses the conclusion of the Commission, based upon supporting data . . ." (p. 80). A reversal on the same ground is even more clearly required here, since the statement seized upon by the District Court in this case was a mere *dictum* referring to a subordinate ground for distinguishing an earlier Commission decision.

C. THE COMMISSION DID NOT "DEPART" FROM ANY "NORM".

At the outset, it is noteworthy that the Commission is not rigidly bound by a doctrine of *stare decisis.* As this Court held in *Virginian Ry. Co.* v. *United States,* 272 U.S. 658, 665-66 (1926), a reviewing court "has no concern with the

correctness of the Commission's reasoning, with the soundness of its conclusions, or *with the alleged inconsistency of findings made in other proceedings before it.*" (Italics added.) The District Court's attempt to restrict the Commission to a supposed "norm" constitutes an improper encroachment upon the authority of the Commission to deal with matters vital to the national transportation system —here, the serious nationwide shortage of freight cars.[15]

But, in any event, the whole premise of the District Court's opinion—*i.e.*, that the Commission "departed" from some "norm" but failed to adequately explain why—is demonstrably false. Contrary to that premise, the Commission did not "depart" from any "norm", and the District Court's attempted reliance on *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954), is wholly misplaced.

The District Court (A. 103-04) imputed to the Commission a "long established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom. . . ." If the District Court means by this "rule" a requirement that the Commission in a § 15(7) proceeding must make a definitive adjudication of every individual line-haul rate involved, there clearly is no such "rule". Such a requirement, this Court held in *Interstate Commerce*

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[15] See 49 U.S.C. § 15a(2), which provides in pertinent part: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service. . . ." The National Transportation Policy, 49 U.S.C. preceding § 1, similarly emphasizes the need to promote adequate transportation conditions suitable to national needs.

Commission v. *Inland Waterways Corp.*, 319 U.S. 671 (1943), would be contrary to the limited purpose of § 15(7). In language remarkably applicable to the instant case, this Court pointed out (p. 689):

> "The construction contended for would have the effect either of imposing a practically impossible burden upon the Commission or of making resort to the Commission's powers under § 15(7) so rare as to make such powers of little practical significance. Suspension cases are very numerous, and in many of them the construction contended for would require the Commission to 'readjust the entire rate structure of an important section of the country.'"

Moreover, the Court held (p. 687) that rates not specifically adjudicated in a § 15(7) proceeding ". . . stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." Such rates may still be challenged through, *e.g.*, a complaint proceeding under Section 13(1) of the Act, 49 U.S.C. § 13(1) (*supra*, pp. 4-5), or by a request that a lower maximum level be established under Section 15(1), 49 U.S.C. § 15(1) (*supra*, p. 5).

On the other hand, if the District Court means by the stated "rule" that the Commission in such cases has usually considered not only the reasonableness of the proposed charge for the service but also the overall reasonableness of the combination of the proposed charges and the line-haul rates, then the Commission's decision here is in full accord with such a "rule"; for that is plainly and unequivocally what the Commission did.

The District Court, however, disregarded the Commission's detailed findings. In addition, as shown *infra*, pp. 38-41, each of the decisions cited by the District Court is either wholly inapplicable or clearly consistent with the Commission's decision in this case.

1. The Court Below Disregarded the Commission's Findings as to the Reasonableness of the Aggregate Charges and the Optional Nature of the In-Transit Inspection Service.

The Commission found that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (A. 18); that "it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad" (A. 17); that "There are numerous shipments of the grain where in-transit inspections are not performed" (A. 18); and that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (A. 18). The Commission also pointed out that since 1963 the eastern railroads have been making a separate charge for the first in-transit inspection per shipment (A. 14), and that all railroads have been making separate charges for second and subsequent in-transit inspections (A. 10). Under all the circumstances, and particularly in view of the impact of the 1968 amendment, the Commission found that in-transit inspection "is an accessorial service for which a charge separate from the line-haul charges may properly be assessed" (A. 19).

The correctness of the Commission's findings as to the optional nature of in-transit inspection has been confirmed by shipper practices after the charges went into effect. As the Commission anticipated, the number of in-transit inspections (and resulting car delay) has been sharply reduced, and will continue to decline, as shippers turn to alternative sampling methods to avoid the separate charge. See Statement, *supra*, p. 13.

But even if some shippers insist on demanding in-transit inspections, the Commission specifically found that their *total* charges—the separate inspection charges plus the existing line-haul rates—*would not exceed the maximum reasonable level.*

"A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R. Co.,* 294 U.S. 499, 506 (1935). In this case, the Commission found that the line-haul rates, even when increased by the separate inspection charges, did not exceed the upper level of the applicable "zone of reasonableness." Pointing out that "There is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products," the Commission found that "The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities" (A. 38; see Statement, *supra*, p. 11).[16] The Commission further found that the challenged tariffs were structured so that any combination of the inspection charge and the existing line-haul rate would in no case exceed the maximum rate level (A. 14, 38).

Thus, contrary to the implication of the District Court's opinion, the Commission *did* consider the over-all reasonableness of the combination of the proposed charges and

[16] Although the plaintiffs-appellees (Wichita Motion to Affirm, pp. 17-18; see also USDA Motion to Affirm, pp. 6-8) now criticize the Commission's reliance on the adjusted Docket 17000 rates, it is significant that they themselves, in a related lawsuit attacking the tariffs here in issue, recognized the present applicability of those rates and indeed relied on those rates as constituting the current maximum level. See Statement, *supra,* p. 14 n.6.

the line-haul rates. The Commission's determination, furthermore, was plainly a valid exercise of the Commission's authority under § 15(7), especially in view of the limited scope of a § 15(7) proceeding and the availability of alternative remedies to any shipper who may feel himself aggrieved. See *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689 (1943), *supra*, p. 35.

2. The Decisions Cited by the District Court Are Wholly Inapplicable or Clearly Consistent with the Commission's Decision in This Case.

In support of the "long established rule" from which the Commission allegedly "departed" in this case, the District Court (A. 103-04) cited six cases: *Reconsignment Case No. 3*, 53 I.C.C. 455 (1919); *Unloading Lumber to New York Harbor*, 256 I.C.C. 463 (1943); *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943); *Grand Forks Chamber of Commerce* v. *Great Northern Railway Co.*, 321 I.C.C. 356 (1963); *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1968); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954).

At most, these decisions require (in the District Court's language) "that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom . . ." (A. 103-04). But it is precisely that requirement which the Commission found was satisfied here. Not a single one of these decisions is contrary to the Commission's ruling in this case. There is, in short, no "departure" from any supposed "norm."

In *Reconsignment Case No. 3, supra*, the test laid down by the Commission (quoting *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61 (1915)) was simply that a separate charge cannot be allowed "without taking

into consideration" the aggregate charges. (53 I.C.C. at 468-69.) The Commission's decision in the instant proceeding clearly met that test. In addition, as to the propriety of making a separate charge for inspection, *Reconsignment Case No. 3* also emphasized—like the Commission's decision in this case—the importance of whether the inspection is required by law. (53 I.C.C. at 467-68, 471.) The 1968 amendment, as already noted, made inspection entirely optional.

In *Unloading Lumber to New York Harbor, supra,* the Commission stated the "rule" as requiring "an adequate showing that the aggregate charge for the through service is reasonable" (256 I.C.C. at 468)—also a standard clearly met here.

In *Terminal Charges at Pacific Coast Ports, supra,* the proposed new charges (for certain terminal services including switching and drayage and "free time") were found to be unreasonable in themselves, and accordingly it was unnecessary to consider the reasonableness of the combination of the proposed charges and the line-haul rate (255 I.C.C. at 682).

Grand Forks Chamber of Commerce v. *Great Northern Railway Co., supra,* surprisingly cited by the Court below, is actually strong precedent in support of the Commission's decision. Indeed, the Commission decision (A. 18-19) cites *Grand Forks* for the proposition that "Grain inspection is an accessorial service for which a charge separate from the line-haul charges may properly be assessed." In *Grand Forks,* a separate charge for grain inspections at certain points was sustained by the Commission where it found that the charge generally covered the costs of the railroads' services and, when coupled with the line-haul rates, generally did not exceed the Docket 17000, Part 7 level of rates (321 I.C.C. at 359).

In *Transit Charges, Southern Territory, supra,* it was found *inter alia* that "the imposition of the proposed additional $22 per car *may well result in rates and charges which exceed reasonable maxima*" (332 I.C.C. at 686, italics added).[17] In the instant case, the Commission in its "chief subsidiary findings" specifically distinguished *Transit Charges* on the ground that here the proposed charges when added to the line-haul rates do *not* exceed the maximum reasonable level.

In *Secretary of Agriculture* v. *United States,* 347 U.S. 645 (1954), *supra,* also cited by the Court below in its discussion of the Commission's "rule" (A. 104), it appears that the Commission *made no determination of the reasonableness of the aggregate charges.* However, in the instant case, the Commission *did* make this essential determination.

Furthermore, the nature of the service involved in *Secretary of Agriculture* v. *United States* (as in *Unloading Lumber to New York Harbor* and *Terminal Charges at Pacific Coast Ports*) was fundamentally different. At issue in *Secretary of Agriculture* was a special charge for unloading which had to be performed by the carrier since the goods were not accessible to the consignees. The Court pointed out that "the unloading is an essential part of the delivery and hence is necessarily encompassed in the linehaul" (347 U.S. at 652).

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[17] The order in *Transit Charges* rejecting the proposed charges was affirmed by the District Court solely on the basis of the Commission's finding that "the proposal, if approved, may well cause a substantial diversion of traffic to competing modes. . . ." (332 I.C.C. at 684). *Cin. N. O. & T. P. R. Co.* v. *United States* (unreported) (S.D.Ohio 1970), aff'd per curiam, 400 U.S. 932 (1970). The Commission in the instant case determined that "Similar conclusions are not warranted here" (A. 39).

By contrast, the Commission in the instant case found that "it is not essential that the grade of the grain be determined while the particular shipment is in transit on the railroad" (A. 17); that, by virtue of the 1968 amendment, "in-transit inspection is now permissive under the Federal statutes and can be either omitted entirely or made through samples taken prior to tender at origin or subsequent to delivery at destination" (A. 18); and that "The basic responsibility of the railroads does not require them to provide the service for in-transit inspection" (A. 18).

3. The Court Below Further Failed to Consider the Unique Circumstances of This Case.

Only by disregarding the Commission's findings could the District Court infer some "departure" from an alleged Commission "norm." Furthermore, "In dealing with technical and complex matters like these, the Commission must necessarily have wide discretion in formulating appropriate solutions." *Secretary of Agriculture* v. *United States*, 347 U.S. at 652.

In that case, unlike this one, not only was the service indispensable to delivery but also the Commission had failed to consider the reasonableness of the aggregate charges (see *supra*, p. 40). Yet, even in that situation, this Court emphasized that ". . . the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case" (p. 652).

Here, given "the unique circumstances of this case," the Commission concluded that in-transit grain inspections are *not* an integral part of the line-haul transportation but, in fact, a serious *interruption* which the Commission determined is a significant factor in the "recurring shortages of freight cars available to serve the Nation's ship-

pers." *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 745 (1972).

The decision of the District Court, however, ignores "the unique circumstances of this case" set forth in the Commission's findings, misconceives the nature and scope of a § 15(7) proceeding, and violates the most basic standards of judicial review.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to that Court with directions to enter a judgment affirming the Commission's order.

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January 5, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF OF THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the district court (App. 100)[1] is not yet reported. The report of Division 2 of the Interstate Commerce Commission (App. 6) is published at 339 I.C.C. 364, and was affirmed by a report of the entire Commission (App. 64) published at 340 I.C.C. 69.

[1] "App." refers to the Appendix filed herein in both appeals.

JURISDICTION

The opinion of the three-judge district court was entered on May 24, 1972. The railroad appellants filed a motion for correction of opinion on May 26, 1972. Appellant, Interstate Commerce Commission, filed a motion for amendment of opinion on May 31, 1972. On June 8, 1972, the district court denied these motions and entered judgment (App. 107). On June 9, 1972, the railroad appellants filed their notice of appeal (App. 109). That appeal (No. 72-214) was docketed on August 7, 1972. The Commission filed its notice of appeal on July 20, 1972 (App. 113). That appeal (No. 72-433) was docketed on September 14, 1972. On November 13, 1972, this Court noted probable jurisdiction and consolidated the two appeals. The jurisdiction of this Court to review the district court's decision on direct appeal rests on 28 U.S.C. §§ 1253 and 2101(b).

QUESTIONS PRESENTED

The Commission found just and reasonable certain charges that the railroads proposed to assess for diverting carloads of grain to permit in-transit inspection of their contents, an ancillary service not assumed by the railroads as part of their duty to provide transportation. The questions presented are:

(1) Whether the lower court erred in holding that the Commission's order lacked adequate supportive findings, although the Commission had explained fully in its report that the charges were intended to improve car utilization by discouraging in-transit inspection, and that, to the extent that they accrued, such charges, together with the line-haul rates, would be just and

reasonable and not in excess of the maximum reasonable level of rates on grain, as earlier established by the Commission.[2]

(2) Whether the lower court exceeded its powers in suspending the in-transit inspection charges pending remand of the proceeding to the Commission and further order of the court.

STATUTES INVOLVED

Section 1(5) of the Interstate Commerce Act, 54 Stat. 900, as amended, 49 U.S.C. § 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15(7) of the Interstate Commerce Act, 24 Stat. 379, 384, as amended, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so

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[2] While the Commission's notice of appeal was limited to the suspension issue, this brief will be directed to all issues as to which this Court has noted probable jurisdiction.

orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund,

with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

STATEMENT

The district court invalidated a decision of the Commission finding just and reasonable certain railroad charges for services connected with the in-transit inspection of grain, and remanded the case to the Commission. In the interim the court below suspended the charges "until and unless otherwise ordered by this Court" (App. 106). The Commission's decision, rendered, among other reasons, to facilitate the movement of grain and to improve the national freight car supply, embraced the finding that imposition of these charges—which were found to be cost-justified and otherwise just and reasonable on the usual basis of review (App. 54)—would tend to deter use of the in-transit inspection procedure and thereby "make a substantial contribution toward the improvement of the national freight car supply" (App. 56).

A. BACKGROUND

This case involves new, separate charges for the in-transit inspection of grain moving in the Western District of the United States.[3] "In-transit inspection" refers to the ancillary service of stopping a carload of grain while it is in transit, switching it out of the train and placing it in a location on the railroad's track facilities for the purposes of permitting the sampling and grading of the contents, awaiting disposition orders from the shipper, and subsequently placing the car back into normal movement. The inspection itself is performed by U.S. Department of Agriculture-licensed inspectors manually probing the grain to obtain samples by which quality can be judged and the result forwarded to the consignee in advance of arrival of the car.

Prior to 1968, the United States Grain Standards Act (7 U.S.C. § 71 *et seq.*) provided that all interstate movements of whole grains must be inspected for the purpose of determining their official grade. While the law did not require that the inspection be performed in transit, over the years this became the customary procedure (App. 14, 17). In 1934 the Commission in *Grain and Grain Products,* 205 I.C.C. 301, 215 I.C.C. 83, approved rail tariffs providing for the inclusion of one in-transit inspection in the line-haul rates, without separate charge, and at least since then the services associated

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[3] "Western District", for purposes of rate proceedings, includes that area of the nation west of the Mississippi River, plus Illinois, Wisconsin and Upper Michigan. New or increased charges were authorized for other parts of the country as well, but no judicial review was sought as to them (See following footnote).

with the first in-transit inspection usually have been included in the line-haul rate.[4]

By the late 1960's, however, it had become apparent that in-transit inspection of grain was no longer suited to present-day marketing and transportation needs. From a transportation standpoint, the practice resulted in tying up badly-needed freight cars for an average of three days per inspection, thus exacerbating the continuing car supply problem, particularly during the critical harvest season (App. 55). Indeed, it was estimated that if the practice were discontinued, the equivalent of 6,000 additional cars would be made available to the national freight car supply (*Ibid.*).

In 1968, Congress amended the Grain Standards Act to eliminate the inspection requirement (Public Law 90-487; 82 Stat. 761). As we shall discuss in greater detail, *infra,* at pp. 18-24, a major purpose of the amendment was to avoid the serious delays and detention of cars switched for in-transit inspection and, thus, to help to alleviate the ever-worsening problem of freight car supply.

The amendment, however, did not immediately achieve its purpose. Despite the fact that inspection

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[4] There were exceptions. Eastern railroads (those operating east of Illinois and north of the Ohio and Potomac Rivers) have collected separate charges for the first inspection since 1963. Those were increased in the instant proceeding, an action not at issue here. The charges are generally new in the South (east of the Mississippi River and south of the Ohio and Potomac Rivers) and in the West, but were challenged here only as regards the West. Even there, however, separate charges for the first inspection have existed previously in certain instances; see, *e.g., Grand Forks Chamber of Commerce* v. *Great Northern Ry. Co.,* 321 I.C.C. 356 (1963).

was no longer required by law, the continued availability of the in-transit inspection privilege without separate charge meant that in-transit inspections actually increased, rising from 464,000 in 1968 to 488,000 in 1969 in Western District alone (App. 10). The car supply problem worsened accordingly, particularly during the harvest season (App. 54).[5]

B. PROCEEDINGS BEFORE THE COMMISSION

In late 1969, the railroads serving the West filed with the Commission proposed tariff schedules, stating separate charges, apart from the line-haul rates, for the service of in-transit inspection. The stated purpose of the proposal was to discourage use of the inspection service, thereby eliminating delays in the movement of grain and making more cars available for transportation. Upon protest of some of the appellees and others, the Commission's Board of Suspension delayed the effective date of the proposal to October 27, 1970—the maximum seven-month period authorized by statute. After the submission of written evidence, extensive oral hearings were held in July and August 1970. Since the Commission, due to the complexity of the case, could not render a considered decision prior to the expiration of the seven-month suspension period, the railroads voluntarily postponed the effective date of the charges until April 24, 1971.

On April 16, 1971, the Commission's Division 2 issued its report finding the proposed charges just and reason-

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[5] *Cf. United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 742; *85th Annual Report of the I.C.C.* (1971), at pp. 25-29.

able (App. 6-63). In its report, the Commission summarized the facts surrounding the proposed separate charges for in-transit inspection (App. 10-16), pointing to the enormous quantity of grain and grain products involved, and detailing the rate structure generally applicable to this trade. In concluding that the new charges were just and reasonable, the Commission considered several relevant factors. First, the inspection charges as proposed do not apply in any instance where applicable line-haul rates plus the charges would exceed the maximum reasonable level of grain rates established in *Grain and Grain Products, supra,* as increased by subsequent decisions authorizing general revenue increases (App. 38, 56). Second, inspection of grain since 1968 has not been a mandatory requirement of law, and a primary reason for removing the requirement was to expedite grain movements and increase the supply of freight cars (App. 15, 56). The Commission considered the current need for inspection and the relative merits of in-transit versus other methods of inspection, and, while it found that there is a need for having inspection available at some point in the grain marketing process, it concluded it need not be while the grain shipment is in transit. Other methods have become available in recent years, notably mechanical sampling at the point of origin, which is authorized by U.S. Department of Agriculture regulations and increasingly is acceptable to members of the grain trade. In short, there was no showing that in-transit inspection continued to be essential to the grain marketing process. In addition, the railroads' basic duty to provide transportation was found by the Commission not to include in-transit in-

spection services, and in fact such services are not performed on numerous shipments. Thus, grain inspection in transit is an "accessorial" service for which a charge separate from the basic line-haul rates may properly be assessed (App. 16-19).

With respect to the reasonableness of the level of the new charges, the Commission found, in findings not challenged here, that the railroads had successfully established that costs associated with in-transit inspection are equivalent to the level of the proposed charges (App. 19-28, 39-53, 56).[6] In connection with this finding the Commission also found that transportation delays caused by in-transit inspection exceed three days per car, which amounted to a loss of 1.5 million car-days per year in the West alone in 1969. Otherwise stated, the nation's car fleet is reduced by 6,000 per year, with attendant losses, financial and otherwise, to the railroads and the shipping public (App. 55).

Turning to the issue of whether the new charges had to be evaluated in conjunction with cost data relating to individual line-haul rates, the Commission concluded they did not. Earlier cases where this had been required, notably *Transit Charges, Southern Territory*, 332 I.C.C. 664 (1969),[7] were distinguished primarily on the ground that here the new charges by the terms of the tariff would not exceed maximum reasonable grain rate levels,

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[6] The basic inspection charge originally was $13.50 per car, but that figure has risen to approximately $17 due to subsequent general revenue increases. The Commission's findings relating to cost of the service were not challenged in court.

[7] Sustained on other grounds, *Cincinnati, N.O. & T.P. R. Co.* v. *United States* [unreported], S.D. Ohio, affirmed *per curiam*, 400 U.S. 932.

as measured by the level established by the Commission in *Grain and Grain Products, supra;* subsequently increased by general revenue increases, after extensive review; and subjected to thorough analysis in a multitude of other proceedings.[8] Thus the maximum levels, which cannot be exceeded by reason of the new charges, were deemed the proper standard to measure the reasonableness of line-haul rates plus inspection charges in the movement of grain (App. 36-38, 56).

Division 2 summarized its findings and concluded its report as follows (App. 55-56):

> In the interest of a better understanding of this complex proceeding we restate, in summary, the chief subsidiary findings that lead us to the ultimate conclusion that the considered schedules are just and reasonable.
>
> 1. The official inspection of grain is no longer mandatory with the amendment in 1968 to the Grain Standards Act, and increased railroad freight car utilization was a consideration in that statutory revision. The statutory change coupled with evidence of record that the inspection may be omitted, made at origin, or made at destination, establishes that in-transit inspection is no longer essential to the orderly marketing of grain.
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> 2. Pursuant to orders of this Commission in Docket No. 17000, Part 7, proceedings, a maximum

[8] Indeed, the in-transit inspection charges as published by the railroads by their terms were not to apply where the previously-established maxima already applied or where the charges plus the applicable line-haul rate would exceed such maxima.

reasonable level of rates on grain in the West was established. The proposed charges when added to the line-haul rates do not exceed the maximum level prescribed. Where they do, the proposed charges do not apply. Approval of the proposed charges will not contravene our prior orders. Thus, the instant proceeding is distinguishable from our decision in *Transit Charges, Southern Territory, supra.*

3. The detention and cost studies presented and discussed establish that the proposed charges are just and reasonable.

4. The establishment of the proposed charges will eliminate at least some of the car detention time due to in-transit inspection, and the resultant increased car utilization will make a substantial contribution toward the improvement of the national freight car supply.

Accordingly, we find that the proposed new or increased in-transit charges for inspection of grain at various points in the United States are just and reasonable and otherwise lawful.

Following the issuance of the Division 2 report and order, the charges at issue went into effect.[9] After the filing of petitions for reconsideration and replies, and

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[9] The voluntarily postponed effective date of April 24, 1971, was delayed to May 4, 1971, by a court suit brought by certain protestants, including some appellees here, *Board of Trade of Kansas City, Mo.* v. *Atchison, T. & S.F. Ry. Co.*, Civil Action No. 1932-4, W.D. Mo. The tariffs were temporarily restrained for ten days, but following hearing, injunctive relief was denied.

oral argument before the entire Commission, the Commission *en banc* entered a second report and order adopting Division 2's report with only minor modifications and denying the petitions for reconsideration (App. 64-72). The Commission further retained jurisdiction of the matter for the purpose of receiving and considering periodic reports from the railroads indicating revenues derived from the in-transit charges (App. 70-71).[10]

C. THE DECISION OF THE THREE-JUDGE DISTRICT COURT

The proceedings in the lower court were initiated by appellees (less than one-third of which had participated in the Commission proceeding), who sought to enjoin and set aside the decision of the Commission. Appellant railroads intervened in support of the Commission's action, and the Secretary of Agriculture intervened in opposition. The case was heard by a three-judge court pursuant to 28 U.S.C. §§ 2284, 2321-25.

In its opinion entered May 24, 1972 (App. 100-106), the lower court set aside the Commission's order and remanded the case "for further proceedings consistent with this opinion" (App. 106). The court agreed with the Commission's "chief subsidiary findings" (recited

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[10] The first such report was filed on July 7, 1972, which showed that the percentage of shipments inspected for the latest six-month reporting period decreased to 25% from the 59.8% figure applicable to the same period one year earlier, prior to the effective date of the changes. These figures were limited to 17 carriers with complete data. The second report was filed in December 1972, and shows a similar pattern. Copies of these reports have been lodged with the clerk of the court.

at pp. 11-12, *supra*) and found them to be supported by substantial evidence. However, focusing on a subordinate finding of the Commission, the court found error in the Commission's conclusion that consideration of thousands of individual line-haul rates was not required and held that ". . . the Commission has not adequately explained, for purposes of our review, its departure from prior norms" (*Ibid.*). The court, also, without any request for such relief or any discussion of its power to grant it, ordered that the in-transit charges "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (*Ibid.*).

On May 26, 1972, the railroad appellants filed a motion for correction of opinion in which they argued that the lower court exceeded its powers by suspending the charges. The Commission filed a similar motion on May 31, 1972. On June 8, 1972, the district court entered its order denying the motions (App. 107-108).

On June 9, 1972, the railroad appellants filed in the court below their notice of appeal and a motion for stay of judgment pending determination of the appeal. The motion, which was supported by the Commission, was denied on June 19, 1972. The railroads thereafter applied to this Court for a stay, and were again supported by the Commission. On July 7, 1972, this Court entered an order staying the district court's judgment, subject to an accounting and refund provision (App. 111-112). On July 20, 1972, the Commission filed its notice of appeal.

The railroads' appeal was docketed on August 7, 1972, as No. 72-214. The Commission's appeal was docketed September 14, 1972, as No. 72-433. On November 13,

1972, this Court noted probable jurisdiction and consolidated the two appeals.

SUMMARY OF ARGUMENT

The traditional patterns of marketing grain in America have been disrupted in recent years,[11] and among the factors both contributing and resulting from such change has been the elimination of mandatory U.S. Department of Agriculture inspection of grain shipped in interstate commerce.[12] The 1968 amendment of the United States Grain Standards Act, 7 U.S.C. § 71 *et seq.*, eliminating this requirement, obviated the need for the railroads' continuing to provide for in-transit inspection of grain, a "service [that previously sprang] from a requirement of law based on business usage and the necessities of the trade." *Reconsignment Case No. 3*, 53 I.C.C. 455, 468 (1919).

When thereafter they nevertheless found that the in-transit inspections of grain were continuing and even being requested more frequently, the railroads serving the West sought to impose separate charges for this service. Like demurrage, the proposed in-transit inspection charges "have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote efficiency by providing a deterrent against undue deten-

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[11] *Arrow Co.* v. *Cincinnati, N.O. & T.P. R. Co.*, 379 U.S. 642, affirming (in effect) *per curiam*, 229 F. Supp. 572 (S.D. Ohio); *Kansas Corp. Comm'n* v. *Arrow Co.*, 361 U.S. 353, affirming *per curiam*, 176 F. Supp. 411 (N.D. Ala.).

[12] P.L. 90-487; 82 Stat. 761.

tion." *Turner Lumber Co.* v. *C.M. & St. P. Ry.*, 271 U.S. 259, 262-63.

The Commission in the assailed orders found the in-transit inspection charges to be just and reasonable. The free use by the grain trade of the detention privileges had resulted in the loss in the number of available freight cars by several thousand annually—a loss that at times of acute equipment shortages neither the shippers nor the railroads of the country could well afford; by discouraging the use of the inspection service, such charges, the Commission found, would enhance the utilization of available rail cars. Indeed, as the Commission noted, improvement in car utilization was one of the reasons for the statutory amendment eliminating mandatory grain inspection.

The Commission further found that the proposed charges and the resulting level of total charges to be paid by the shipper were just and reasonable. The in-transit inspection charges, the Commission noted, were not to apply when the underlying line-haul rates for the movement of the grain, or such line-haul rates together with the charges, exceed the rates established by the Commission as reasonable maxima in prior investigations of railroad grain rates. In other words, the Commission found, "the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum level determined by this Commission."

The lower court misapprehended and deprecated the

Commission's finding and, therefore, erroneously concluded that the Commission had failed to observe its prior decisions, discussed by this Court in *Secretary of Agriculture* v. *United States,* 347 U.S. 645, that the publication of separate charges for services previously performed by the railroads at the line-haul rates ordinarily requires a determination of the justness and reasonableness of such charges together with the line-haul rates. This, of course, was precisely what the Commission did herein, and its findings were well within its discretion.

Assuming *arguendo* that the lower court correctly held that the Commission failed adequately to explain its approval of the in-transit grain inspection charges, it nevertheless exceeded its authority in suspending such charges pending remand of the proceeding to the Commission and further order of the court. This Court's decision in *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658, permits of no doubt that the power to suspend rates has been vested exclusively, and then only under limited circumstances, in the Commission. The reviewing court's task "ends when an error of law is laid bare." *Federal Power Comm'n* v. *Idaho Power Co.,* 344 U.S. 17, 20. Thereafter, it is for the Commission to fashion appropriate relief consistently with the court's opinion; certainly the court cannot itself "reinstitute a suspension which has already continued as long as Congress allows." *National Small Shipments Traffic Conf.* v. *United States,* 321 F. Supp. 500, 515 (S.D.N.Y.).

ARGUMENT

I.

THE COMMISSION ACTED WITHIN ITS DISCRETION IN APPROVING SEPARATE REASONABLE CHARGES FOR IN-TRANSIT INSPECTION AS A MEANS OF HELPING TO ALLEVIATE THE FREIGHT CAR SHORTAGE BY DISCOURAGING USE OF THIS TIME-CONSUMING, DISRUPTIVE SERVICE

(A) A MAJOR PURPOSE OF THE 1968 AMENDMENTS TO THE GRAIN STANDARDS ACT WAS TO IMPROVE THE AVAILABLE FREIGHT CAR SUPPLY BY DISCOURAGING IN-TRANSIT INSPECTION.

The "recurring shortages of freight cars available to serve the Nation's shippers" (*United States* v. *Allegheny-Ludlum Steel Corporation*, 406 U.S. 742) has been a matter of serious concern to Congress and the Commission, as well as shippers and carriers, for a number of years. Within the past decade, Congress has conducted hearings on the specific problem of freight car shortages,[13] and has considered various bills designed, in

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[13] Hearings before the Freight Car Shortage Subcommittee of the Senate Committee on Commerce, 89th Cong., 1st Sess.; Hearings on Freight Car Shortages Before the Special Subcommittee on Investigation, House Committee on Interstate and Foreign Commerce, 92nd Cong., 1st and 2nd Sess., Serial Nos. 92-81 and 92-82. In H. Rep. No. 92-1384, 92nd Cong., 2nd Sess., at p. 22, the House Subcommittee specifically referred to the Commission's decision in this case and noted approvingly:

> Recently, rail carriers have further improved their utilization of grain freight cars by imposing a grain inspection charge for en route inspection. In the case of one major midwestern carrier, a $17 inspection charge eliminated an estimated 80 percent of the en route inspections. Rather than pay

one way or another, to assure a more adequate car supply.[14]

In 1967, the U.S. Department of Agriculture recommended the amendment of the Grain Standards Act to eliminate the requirement, imposed when the Act was first enacted in 1916, of mandatory federal inspection of grain shipped in interstate commerce. Pointing to the changes in grain merchandising practices and transportation methods, the Department urged that mandatory inspection is no longer necessary or practical and that inspection should be placed on a voluntary basis.[15]

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this charge, grain shippers found it preferable to change their marketing practices and to provide for origin sampling. As a result, this same carrier testified it was able to save about 1,000 cars per day. Currently, the legality of this charge is being challenged in the courts and, unfortunately, further delays may result.

[14] See, *e.g.*, Pub. L. 89-430, 80 Stat. 168 (1966), amending § 1(14)(a) of the Interstate Commerce Act, 49 U.S.C. § 1(14)(a); H. Rep. No. 1183, 89th Cong., 2d Sess., Hearings on Freight Car Supply Before the Surface Transp. Subcomm., Senate Comm. on Commerce, 91st Cong., 1st Sess., Serial No. 91-8; S. Rep. No. 92-982 on S. 1729, 92d Cong., 2d Sess.; Hearings on S. 1415, S. 1729, S. 1730, S. 1731, Before the Special Subcomm. on Freight Car Shortages, Senate Committee on Commerce, 92nd Cong., 1st Sess., Serial No. 92-35; S. Rep. No. 92-1155, on S. 2362, the proposed Surface Transp. Act of 1972, 92nd Cong., 2d Sess. A comprehensive summary of the Commission's own efforts over the years in the area of car supply and utilization appears in a statement of Commissioner Rupert L. Murphy, "Freight Car Supply and Utilization—the Regulatory View," attached to House Hearings, *supra*, at fn. 13, pp. 753-789.

[15] See letter from Orville L. Freeman, Secretary, Department of Agriculture, dated June 20, 1967, attached to S. Rep. No. 1372, 90th Cong., 2nd Sess., at pp. 14-15; letter of Secretary Freeman attached to H. Rep. No. 1344, 90th Cong., 2d Sess., at pp. 5-9; Statement of George R. Grange, Dep. Admr. for Marketing Services, Consumer and Marketing Service, USDA, included in Hearings on H.R. 2121

Although focusing primarily on marketing factors, the Department of Agriculture also directed attention to the car supply problem, noting that the "stopping and holding of the cars [for inspection] increases their turnaround time and contributes to the boxcar shortage." [16] This point was emphasized by various officials and individuals directly concerned with car supply problems, who urged Congress to adopt the proposed amendment for this very purpose. Thus the Department of Transportation, supporting enactment of the bill, pointed out: [17]

> The Department believes the bill would have the desirable effect of putting more freight cars into the rail transportation pipeline by eliminating those statutes which now clog up the pipeline with unnecessary regulatory inspections. Under the present provisions of the act, grain moving in interstate commerce is required to be sampled and certified by official grain inspectors. Since official sampling of grain is not available at the small origin elevators and often not practical at intermediate and terminal elevators, official grain inspection is accomplished in-transit at rail points. The enroute stopping of cars causes further delays and congestion due to the rehandling, rebilling, and holding of cars. The stopping and holding of cars at rail points

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and H.R. 11162, before a Subcomm. of the Committee on Agriculture, Ser. R., Part 1 (1967), at pp. 11-14.

[16] H. Rep. No. 1344, 90th Cong., 2d Sess., at p. 18.

[17] Letter from John L. Sweeney, Assistant Secretary for Public Affairs, Office of the Secretary of Transportation, attached to S. Rep. No. 1372, 90th Cong., 2d Sess., at p. 18.

> results in higher operating expenses, lost car utilization, and of major importance, decreased capacity of the existing railcar fleet to handle available grain tonnages. Elimination of in-transit inspection of grain would add an equivalent capacity to the car fleet, something equal to tens of thousands of freight cars. The benefits to shippers and carriers are obvious—cost of conducting transportation is dramatically reduced and customer service improved.

Similarly, the Interstate Commerce Commission stated its position to Congress: [18]

> While we have no specific comments to offer on the specific provisions of this bill, we believe that enactment of legislation of this type would contribute materially to improving the efficient utilization of railroad freight cars. For some time, the Commission has been investigating various aspects of the railroad freight car problem in an effort, among other things, to determine what steps should be taken to obtain improved service and more efficient use of the carriers' equipment. Our field investigations over the years have indicated considerable car delays in the holding of grain for inspection. We

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[18] Letter from Hon. William H. Tucker, Chairman, and Paul J. Turney and Lawrence K. Walrath, Committee on Legislation, Interstate Commerce Commission, attached to H. Rep. No. 1344, 90th Cong., 2d Sess.; see also Hearings Before a Subcomm. of the Senate Committee on Agriculture and Forestry on S.272, S.2069 and H.R. 15794 (1968), at 60-63; Hearings Before the Subcomm. on Livestock and Grain, House Comm. on Agriculture, on H.R.2121 and H.R.11162, Ser. R, Part 2 (1967), at 105-108.

> have also found that grain inspection facilities are nowhere near adequate to meet peak receipts resulting in many cars being held short of terminals awaiting placement on inspection tracks.
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> * * * * *
>
> Since enactment of this bill would give wide latitude to the Secretary of Agriculture to develop and promulgate new methods for the inspection of grain, it could substantially reduce the number of car days lost by cars of grain held for inspection under present procedures. In turn, this would result in improved freight car utilization and make many more cars available to the shipping public. For these reasons, we favor the enactment of H.R. 11162.

The bill was also supported by railroads, grain dealers, legislators and State regulatory officials, whose reasons invariably included the expectation of more efficient utilization of cars.[19]

When the bill was debated on the floor of the House, Representative Purcell of Texas, Chairman of the Subcommittee on Livestock and Grains, House Committee on Agriculture, focused explicit attention on the benefits

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[19] *E.g.*, Statement of D.A. Baumgartner, representing the Association of American Railroads, included in Hearings before a Senate Subcomm. on S.272, S.2069, and H.R. 15794, *supra*, at pp. 103-105; Remarks of Sen. Metcalf of Montana, included in Hearings Before a House Subcomm. on H.R. 2121, and H.R. 11162, Ser. R., part 1, *supra*, at pp. 37-40; Statement of Rep. Olsen of Montana, *id.*, at p. 45; Statements of Frank C. Miller of the Grain and Feed Dealers National Ass'n, Milton Morrison of the Morrison Grain Co., Salina, Kan., John L. Finsness of the North Dakota Pub. Serv. Comm'n, all included in House Hearings, *supra*, part 2, pp. 6, 11-12, 66.

of the bill in terms of freight car supply (114 Cong. Rec. 15517):

> * * * There is another point that needs to be made about the advantage of going to permissive inspection of grain shipped within domestic markets. During examination of this legislation before the subcommittee on Livestock and Grains, which I have the honor to chair, the Interstate Commerce Commission supported this bill as an approach toward easing another problem that exists in our transportation network—that is a problem that occurs during the peak periods of rail transportation of grain, known as a 'boxcar shortage.' In a communication to the subcommittee, the ICC indicated that considerable delays occur in shipment, due to the holding of grain for inspection. The Commission has also found, in their investigations, that grain inspection facilities are not even remotely adequate to meet peak receipts—resulting I am sorry to say, in many cars held much longer than they should at terminals while awaiting inspection.
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> The Interstate Commerce Commission, accordingly felt that the latitude given this bill to develop and promulgate new methods for the inspection of grain, chiefly through mechanical sampling devices, would result in a substantial reduction of the number of car-days lost by cars held for inspection under present procedures.

Similarly, Representative Catherine May of Washington urged passage of the bill in hopes "that use of mechanical sampling equipment will help alleviate the

recurring problem of boxcar shortages, by reducing the amount of time trains will be required to wait for inspection" (114 Cong. Rec. 15519); and Representative Kleppe of North Dakota added, "This bill will reduce the turn-around time on boxcars used for hauling grain which will be of great benefit in reducing the boxcar shortages plaguing not only North Dakota, but other grain-producing states as well" (114 Cong. Rec. 15519).

In sum, as the Commission found, there can be no doubt that "improved car utilization in the movement of whole grain by railroad was a consideration in the revision" of the Grain Standards Act to eliminate the requirement of mandatory inspection (App. 16, 69). It is in light of this statutory purpose that the railroads' proposal, and the Commission's decision, must be evaluated.

(B) THE COMMISSION PROPERLY CONCLUDED THAT THE RAILROADS' PROPOSED SEPARATE CHARGE FOR IN-TRANSIT INSPECTION HAD BEEN SHOWN TO BE JUST AND REASONABLE

It is important at the outset to emphasize the essential difference between this case and the usual rate increase proposal. Ordinarily, a carrier proposes a rate increase for the purpose of obtaining the additional revenue to be derived therefrom. Here, in contrast, the railroads avowedly hoped never to collect one penny of additional revenue from the new in-transit charges. Rather, they declared that the entire purpose of the separately-stated charges was to discourage shippers from requesting in-transit inspection, thereby freeing the freight cars for use in moving freight. The

ultimate effect will, of course, be an increase in total revenue, since the more effective utilization of their cars will enable the railroads to transport traffic they would otherwise be unable to handle (App. 70).

There can be no question that the Commission has the power as well as the obligation to deal with the effect of ratemaking on transportation conditions generally. See Section 15a(2) of the Interstate Commerce Act, 49 U.S.C. § 15a(2).[20] Thus, this Court has emphasized that the agency must not concentrate on cost-revenue matters alone, but must give due consideration to the other public interest factors specified by the statute. *Alabama G.S. R. Co.* v. *United States*, 340 U.S. 216, 223, and cases cited therein; see also *Board of Trade* v. *United States*, 314 U.S. 534, 546, emphasizing the Commission's "duty of being responsive to the dynamic character of transportation problems." To the extent that the decision may depend on a forecast of what may take place in the future, it is a matter for the sound judgment of the Commission. *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241; *Board of Trade* v. *United States, supra*, 314 U.S. at 546.

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[20] Section 15a(2) provides:

> In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Encouraging the more efficient utilization of cars long has been recognized as a factor appropriate for consideration in rate-making. Demurrage charges, for example, which are charges assessed for delay in loading or unloading cars, have been recognized by the courts and the Commission as properly involving in part compensation to the carrier and in part a penalty to encourage the prompt release of equipment. See, e.g., *Turner Lumber Co.* v. *Chicago, M & S & P Ry.* 271 U.S. 259, 262-63; *Pittsburgh & Ohio Mining Co.* v. *B & O R.R.*, 40 I.C.C. 408, 409 (1916). As this Court pointed out in the *Turner Lumber Company* case, *supra*, 271 U.S. at 262-63:

> The efficient use of freight cars is an essential of an adequate transportation system. To secure it, broad powers are conferred upon the Commission. Compare *United States* v. *New River Co.*, 265 U.S. 533; *Avent* v. *United States*, 266 U.S. 127; *United States* v. *P. Koenig Coal Co.*, 270 U.S. 512. One cause of undue detention is lack of promptness in loading at the point of destination. Another cause is diversion of the car from its primary use as an instrument of transportation by employing it as a place of storage, either at destination or at reconsignment points, for a long period while seeking a market for the goods stored therein. To permit a shipper so to use freight cars is obviously beyond the ordinary duties of a carrier. The right to assess charges for undue detention existed at common law. Now, they are subject, like other freight charges, to regulation by the Commission. Demurrage charges are thus published as a part of the tariffs filed pursuant to the statutes.

> All demurrage charges have a double purpose. One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention. *Pennsylvania R.R. Co.* v. *Kitanning Iron & Steel Co.*, 253 U.S. 319, 323; *Edward Hines, etc., Trustees* v. *United States*, 263 U.S. 143, 145.

See, also, *Union Pacific R. Co.* v. *United States*, 362 U.S. 327, 328, in which this Court stated, in sustaining a charge imposed by the railroads for delaying carloads of lumber in transit awaiting the shipper's securing the most favorable market:

> The delay is accomplished by the holding of cars on sidings at certain points on its trunk lines awaiting diversion orders to move the shipment forward over the railroad's regular service. This affords the shipper additional time to find a market for the lumber while it is in transit. This service, the District Court found, incurred additional "operational problems and costs" for appellant, including switching, siding and "per diem cost for the use of foreign cars" not present in its fast freight service and not included in its published tariff. We agree with the District Court that such delayed service constitutes the furnishing of additional "privileges or facilities" under § 6(7) of the Interstate Commerce Act, and, therefore, must be published and filed in its tariff, 49 U.S.C. § 6(1) [Citation omitted].

Here the Commission, in findings sustained by the lower court (App. 102), concluded that each car sub-

jected to inspection is delayed in transit more than three days, cumulating in 1969 in an astounding total of 1.5 million car-days in the Western States alone. Otherwise stated, the practice of in-transit inspection reduced the nation's fleet by some 6,000 cars per year, with all the other losses, financial and otherwise, which that figure entails—a loss of $10 million annually to the railroads alone (App. 56).

These figures admittedly would be of lesser force if there were any reason to believe that in-transit inspection is necessary to the continued efficient operation of the grain trade. But clearly there is not. At most, in-transit inspection is an advantage to some part of the grain trade, which has managed to profit from the old system; hence, the remark of appellees (who are for the most part large grain dealers and boards of trade) that this "penalty would destroy the grain marketing system" (Wichita Motion, p. 3). Notwithstanding, the record shows that (1) technology increasingly permits the use of other, non-transit-related inspection methods (App. 17-18); (2) many grain dealers, as well as the U.S. Department of Agriculture by regulation, accept grain inspected in other ways (*Id.*); (3) many members of the grain trade supported the removal of mandatory inspection before Congress in 1968 on the express ground that such action would facilitate the movement of grain by reducing the number of in-transit inspections; and (4) significant quantities of grain already moved without in-transit inspection before these charges were proposed, including *all* grain by truck or barge and much by rail (App. 15). Thus the circumstances today are altogether different than

when the practice of performing in-transit inspection of grain was assumed by the railroads under the line-haul rates, as approved by the Commission in *Reconsignment Case No. 3,* 53 I.C.C. 455, 468 (1919). No longer can it be said that "the service springs from a requirement of law based on business usage and the necessities of the trade" (53 I.C.C. at 468). Rather, the proposed charges—like the charges for reconsignment generally—have as their primary purpose the "increase [in] car efficiency by reducing the delays incident to reconsignment." *Reconsignment Case,* 47 I.C.C. 590, 593 (1917).

The first question before the Commission, thus, was whether the separately-stated charge for in-transit inspection would have the desired effect of discouraging the use of the inspection service. The Commission's conclusion that it would have this effect was entirely reasonable. As noted *supra* at pp. 6-7, for many years the in-transit inspection service had been included within the line-haul rates. As a practical matter, from the shipper's standpoint the service was thus "free"—*i.e.,* the shipper paid the same rate whether or not he used the service. Thus, even though inspection was no longer required by law, the natural inclination of shippers was to continue to demand in-transit inspection, since it added nothing to their costs. The revision of the tariffs to eliminate the service from the line-haul rate, assessing a separate charge for in-transit inspection, quite obviously would create an incentive for shippers to reevaluate their actual need for in-transit inspection and discourage its use except where it results in some measurable benefit to the shipper.

The Commission thus concluded that the separately-stated charges would have the desired effect of discouraging the use of in-transit inspection, thereby increasing the supply of cars available for moving traffic [21] (App. 55-56). The Commission then turned to the question of the justness and reasonableness of the specific level of charges here proposed. The Commission initially found that grain inspection in transit is an "accessorial" service, comparable to destination storage in cars, rather than an essential part of the line-haul transportation, so that a separate charge may properly be assessed (App. 56), and that the costs associated with in-transit inspection correspond to the level of the proposed charges (*Ibid.*). Those findings were sustained by the lower court as supported by substantial evidence (App. 101-102). The Commission further found that the total charge for the line-haul rates plus the separately-stated inspection charges does not exceed a just and reasonable level for the total services provided. It is this latter finding that was overturned by the district court, on the basis of an alleged failure on the part of the Commission to "explain its departure from prior norms" (App. 104).

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[21] The correctness of the Commission's conclusion is confirmed by this actual experience of the carriers since May 4, 1971—the date on which the new charges went into effect. In a report filed with the Commission on July 7, 1972, it was revealed that the percentage of grain shipments for which in-transit inspection was requested had declined from 60% in a six-month reporting period prior to the effective date of the charges to 25% for a corresponding period after the effective date. This results in the equivalent of an additional 3,500 cars added to the Nation's freight car supply.

We will demonstrate that the lower court's ruling is without foundation.

The Commission took note of the fact that in its prior decision in *Transit Charges, Southern Territory,* 332 I.C.C. 664, (1969),[22] it had disapproved a proposed separate charge for a different type of service (a transit privilege) for failure to adduce specific evidence concerning "the line-haul rates, the services furnished thereunder, and the cost thereof." (*Id.* at 683-84). But it concluded that the instant proceeding was distinguishable in two respects: (1) the vast number of varying line-haul rates comprising the complex grain rate structure, which makes analysis of the costs and services under each rate virtually prohibitive (App. 37); and (2) what the Commission described as "a more significant distinguishing feature"—the fact that here the combination of the line-haul rates plus the separately-stated in-transit charges would in no event exceed the maximum reasonable rate level previously determined by the Commission (App. 37-38). In reversing the Commission's decision, the district court virtually ignored the second, and "more significant" distinction, merely observing that the maximum reasonable rates on grain "had been known for years" (App. 103), and held that the practical reasons for which the Commission had concluded that the submission of evidence relating to individual line-haul rates was not feasible here constituted an impermissible and discriminatory "departure from prior norms"

[22] Sustained on other grounds in *Cincinnati, N.O.&T.P. R. Co.* v. *United States,* C.A. No. 6992, S.D. Ohio (unreported), aff'd 400 U.S. 932.

which was not adequately explained (App. 104-106). But wholly apart from the impracticality of demanding evidence as to individual line-haul rates on grain,[23] the alleged "norm" to which the district court refers simply has no application when, as here, the maximum reasonable level of the total rate can be determined by reference to prior Commission decisions.

There is, of course, no one rate level which constitutes the sole "reasonable" rate for a particular movement. Rather, "[a] zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 506. Thus, the essential question in evaluating a proposed rate increase is whether it has been shown to be no higher than the reasonable maximum for the movement involved.

The critical factor here is the fact that, by the very terms of the tariff, the combination of the proposed in-transit charges and the line-haul rates can never exceed the maximum reasonable level of grain rates established in the "Docket 17000, Part 7, Rate Structure Investigation", *Grain and Grain Products*, 205 I.C.C. 301 (1934); 215 I.C.C. 83 (1936), as raised by subsequent general revenue increases. The "Docket 17000,

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[23] This is not to say that the impracticality of requiring evidence pertaining to line-haul rates is an insignificant matter. There are thousands of such rates, varying to a large degree, and all part of a complex grain rate structure. As the Commission stated (App. 37), such a requirement could effectively preclude the railroads from ever establishing a separate charge for in-transit inspection, regardless of need. *Cf. Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 689.

Part 7, Rate Structure Investigation," in which the Commission undertook a comprehensive inquiry into the grain rate structure, was an outgrowth of the Hoch-Smith Resolution of 1925,[24] in which Congress ordered the Commission to undertake a "thorough investigation" of the rates and rate structures of the Nation's carriers, with particular emphasis, "[i]n view of the existing depression in agriculture," on rates involving agricultural commodities. The result of that investigation was the prescription by the Commission of maximum rate levels on grain (*Grain and Grain Products, supra,* 205 I.C.C. at 301; 215 I.C.C. at 83).[25] Since that time, grain rates have been subjected to continuous review, including various structural reforms (*e.g., Grain and Grain Products,* 298 I.C.C. 261 (1956); *Grain and Grain Products,* 329 I.C.C. 824 (1967)), and investigations instituted upon the complaint of various shippers (*e.g., Southeastern Ass'n of R. Util. Comm'rs* v. *Atchison, T.&S.F. Ry. Co.,* 321 I.C.C. 824 (1967), and cases cited therein).

The level of the grain rates, of course, has not remained constant since their original prescription in 1934. Like rates on virtually all commodities, they periodically have been increased, largely as a result of general revenue increase proceedings, dictated by rising labor and other costs. Unlike rates on many commodities, however, grain rates have been the subject

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[24] 43 Stat. 801, 49 U.S.C. § 55.

[25] Rates had earlier been prescribed in *Grain and Grain Products,* 164 I.C.C. 619, 173 I.C.C. 511, but those orders were vacated by this Court in *Atchison, T.&S.F. Ry. Co.* v. *United States,* 284 U.S. 248.

of particularized attention in virtually all those general increase proceedings; see, *e.g.*, as recent examples, *Increased Freight Rates, 1970 and 1971*, 339 I.C.C. 125, 219-228 (1971); *Increased Freight Rates, 1967*, 332 I.C.C. 280, 300 (1968), in which the appropriate level of rates on grain was discussed in some detail.

The Commission concluded that, in light of this history of particularized attention to grain rate levels, the maximum reasonable rates permitted under the Docket 17000, Part 7 prescription, as increased by subsequent general increase proceedings, the "currently effective maximum rate level for the movement of the commodities" (App. 38), was an appropriate yardstick by which to measure the reasonableness of the proposed increases here involved. Since the tariff explicitly provided that the in-transit inspection charges were not to apply when the line-haul rates or the combination of the line-haul rates plus the new in-transit inspection charges exceed the level previously determined in those proceedings to be reasonable, the Commission concluded that the proposed charges had been shown to be within the zone of reasonableness.

Appellees argue at length that the standard employed by the Commission is impermissible on the ground that the Commission in a general increase proceeding does not pass upon the justness and reasonableness of individual line-haul rates. But while the validity of individual rates may not be at issue in a general increase proceeding, the Commission nevertheless does find the overall level of rates approved by it to be just and reasonable (App. 38).[26] It is then incum-

[26] See also, *e.g.*, *Increased Freight Rates, 1967*, *supra*, 332 I.C.C. at 346 (1967).

bent on anyone aggrieved by the increase as applied to specific situations to file a complaint under section 13 (1) of the Act, 49 U.S.C. § 13(1), or request the Commission to determine and prescribe a lower maximum level under section 15(1), 49 U.S.C. § 15(1). *National Small Shipments Traffic Conf.* v. *United States*, 321 F. Supp. 500, 505 (S.D.N.Y.); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (D.D.C.), affirmed by equally divided court, 400 U.S. 73; *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 488 (E.D. Va.); *Increased Freight Rates, 1968*, 332 I.C.C. 714, 792 (1969). No such attack ever has been made on the maximum grain rate levels involved in this case. Consequently, they stand as a measure of the reasonableness of the maximum rate level.

There is nothing novel about the Commission's use of such maximum reasonable rates as a yardstick by which to measure a rate increase proposal. Indeed, this maximum reasonable level of rates was previously relied on by the Commission in approving separate in-transit inspection charges on grain in *Grand Forks Chamber of Commerce* v. *Great Northern Ry. Co.*, 321 I.C.C. 356 (1963), in which the Commission pointed out that such charges, when combined with applicable line-haul rates, were generally lower than previously-established reasonable maxima.[27]

In holding that the Commission lacks the discretion to utilize the previously-determined maximum reasonable level of rates on grain as a yardstick to measure the reasonableness of the new in-transit inspection charge, the district court erroneously imparted to the

[27] *Grand Forks* erroneously was cited by the court below as standing for a contrary proposition. (App. 103).

courts and the Commission some "prior norm" which requires the consideration of cost and revenue factors relating to the thousands of line-haul rates involved. But the simple fact is that no such "prior norm" exists, and the cases relied upon by the district court do not support its theory.

The lower court placed principal reliance on this Court's decision in *Secretary of Agriculture* v. *United States*, 347 U.S. 645. But we submit that it has wholly misread that decision. *Secretary of Agriculture* did not, as the lower court apparently believed, impose any iron-clad "norm" requiring that cost and revenue data as to the line-haul rate be re-evaluated whenever a separate charge for an accessorial service previously included in the line-haul rate is proposed. Rather, *Secretary of Agriculture* requires only that the Commission either (1) follow its "prevailing rule" of "examining the sufficiency of the line-haul rate" before approving such a separate charge or (2) explain its reason for approving the charge without requiring such a showing. Here the Commission *did* in fact examine the line-haul rates and concluded that the railroads had proved that such rates, when combined with the new separate charges for in-transit inspection, would not exceed reasonable maxima. It further explained its reason for concluding that cost data as to thousands of line-haul rates were not, in the unique circumstances of this case (including the car supply problem previously discussed), necessary to a determination of the reasonableness of the line-haul rates plus the inspection charges.

The essential fallacy of the lower court's decision is

its assumption that the reasonableness of a rate can be measured only by detailed cost evidence as to each individual rate involved. But the Commission's role in evaluating the reasonableness of a rate proposal is not that mechanical or mathematical; examination of relevant cost evidence is not the only means available to the Commission in assessing the reasonableness of a rate proposal. For example, it has long been established that a comparison of a proposed rate with other existing rates may be an appropriate means of evaluating the reasonableness of the proposal. See, *e.g.*, *Chamber of Commerce of Fargo, N.D.* v. *United States*, 276 F. Supp. 301, 307 (D.N.D.); *Northwestern Steel & Wire Co.* v. *Pennsylvania R. Co.*, 305 I.C.C. 462, 464 (1958). As the Commission pointed out in *Seaboard Air Line Co.* v. *Southern Ry.*, 329 I.C.C. 17, 27-28 (1966):

> * * * [C]ost data are not the only basis for a determination of the reasonableness of the assailed rates. While it is true that in absence of other probative evidence cost data may be the crucial factor, our conclusion here as to the reasonableness of the assailed rates is based on broader criteria. (citation omitted). The words "just and reasonable" are not fixed, unalterable, mathematical terms. The determination of what is a reasonable rate, measured solely by cost data, would seriously limit the exercise of a flexible judgment.

We submit that the Commission's decision here fully comports with this Court's suggestion in *Secretary of Agriculture* that the reasonableness of the line-haul

rate should ordinarily be reevaluated whenever a separate charge is imposed for a service previously included in the line-haul rate. There is no intimation in *Secretary of Agriculture* that this reevaluation must be made on the basis of cost evidence alone. Here the Commission concluded, as discussed in detail *supra* at pp. 31-36, that the reasonableness of the applicable line-haul rates could be measured by a comparison with the previously-established maximum reasonable rates. Since, by the very terms of the tariff, the combination of the line-haul rates plus the separate in-transit inspection charges could never exceed the level of the previously established maximum reasonable line-haul rates, including the in-transit inspection service, the Commission properly concluded that the resulting line-haul rates had been shown to be within the zone of reasonableness. This evaluation clearly comports with the admonition of *Secretary of Agriculture* that the line-haul rate be reexamined, and the standards of that case are fully satisfied.

Moreover, this Court emphasized in *Secretary of Agriculture* that even the reevaluation of the line-haul rate is not an iron-clad requirement. Noting that "the normal course for the Commission in dealing with a situation like the present would have been to reexamine the sufficiency of the line-haul rate", this Court explicitly held that "the Commission was not precluded from following a procedure fairly adapted to the unique circumstances of this case" (347 U.S. at 642). And it added that in "technical and complex matters like these, the Commission necessarily must have wide discretion in formulating appropriate solutions" (*Ibid*).

To the extent that the Commission's evaluation of the line-haul rates on a basis other than cost evidence may represent a departure from the more usual practice, the Commission fully explained its reasons for deeming reliance herein upon such evidence to be unnecessary and impractical.

Unlike the situation in the ordinary rate proposal, the production of cost data for the line-haul rates here involved would be so difficult and time-consuming as to be virtually prohibitive. As the Commission pointed out (App. 10), approximately 489,000 in-transit inspections took place in 1969 in the western district alone. There are literally thousands of line-haul rates applicable on the grain to, from and through those inspection points. And, because of the complexities of the grain rate structure, these rates vary to a large degree. Compare *Board of Trade of Kansas City* v. *United States, supra,* 314 U.S. at 548. A requirement that cost data for these thousands of line-haul rates be produced would, in the Commission's judgment, "effectively preclude [the carriers] from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge" (App. 37).

Contrary to the district court's conclusion, the recognition of these practical difficulties does not in any way result in "an evidentiary rule which is discriminatory per se" (App. 105). Indeed, we would suggest that precisely the opposite is true: a refusal to recognize such practical difficulties, thereby placing the railroads in a position where they were literally unable to produce the evidence required to adjust a particular

category of rates, would be a gross discrimination against carriers operating under such a rate structure. Compare *Interstate Commerce Commission* v. *Inland Waterways Corp., supra* 319 U.S. at 689, in which this Court refused to interpret the statute there involved in such a way as to impose "a practically impossible burden" on the agency.

The remaining cases relied upon by the lower court require no different result. For the most part, those cases merely constitute instances in which the Commission found, on the basis of other facts, that cost evidence was necessary to an evaluation of the line-haul rate. For example, in *Transit Charges—Southern Territory, supra* 332 I.C.C. at 664, which involved a proposed separate charge for transit privileges, the Commission specifically found (in sharp contrast to the instant case) that the combination of the line-haul rates and the separate charges proposed for the service "may well result in rates and charges which exceed reasonable maxima" (332 I.C.C. at 686). In those circumstances, additional evidence as to the reasonableness of the proposal was, quite logically, held to be necessary. Similarly, in *Lumber at New York Harbor,* 256 I.C.C. 463 (1943); and *Terminal Charges at Pacific Coast Ports,* 255 I.C.C. 673 (1943), the Commission found that no satisfactory showing—on the basis of costs or any other basis—had been made as to the reasonableness of the resulting line-haul rates there involved, so that the justness and reasonableness of the proposal had not been established. But there is nothing in those opinions to indicate that the necessary showing could be met by cost evidence alone.

Finally, the lower court inexplicably relied upon *GrandForks Chamber of Commerce* v. *Great Northern Railway, supra,* 321 I.C.C. at 356 (App. 103). But that case is actually strong precedent for the Commission's decision here. There, as here, the carriers published a separate in-transit inspection charge on grain. There, as here, the cost of the service was shown to correspond to the proposed separate charge. In finding the proposed charge to be just and reasonable, the Commission relied—just as it did here—on the fact that the combination of the separate charge and the line-haul rate generally was less than the maximum reasonable rates previously determined in the Docket 17000, Part 7 investigation, as raised by subsequent general increases (321 I.C.C. at 359). That case thus in no way indicates any contrary "prior norm", but rather an application of the same principle applied in the instant case.

In sum, the Commission acted well within its discretion in concluding that cost and revenue data relating to thousands of individual line-haul rates on grain were not necessary to a determination of the justness and reasonableness of the proposed in-transit inspection charges. The inspection charges were shown to correspond to the costs of providing the service, and such charges, together with the line-haul rates, would not exceed levels previously judged reasonable in prior Commission proceedings. Moreover, unlike ordinary rate increase proposals, the entire purpose of the inspection charges was not to collect additional compensation but rather to discourage use of a service which was tying up thousands of freight cars needed for transportation. In these circumstances, and in view

of the Commission's findings as a whole, to require that implementation of the proposal be delayed until exhaustive studies, involving thousands of individual rates, could be made and specific costs analyzed would be contrary to sound transportation policy and inimical to the best interest of shippers as well as carriers, throughout the Nation.

II.

THE COURT BELOW EXCEEDED ITS POWERS BY SUSPENDING THE IN-TRANSIT CHARGES AND RENDERING THEM INEFFECTIVE UNTIL FURTHER ORDER OF THE COURT

In addition to remanding the case to the Commission for further findings on the merits of the proposed in-transit charges, the court below further ordered that the charges themselves "are suspended and shall be ineffective until and unless otherwise ordered by this Court." (App. 106). Even if the lower court properly remanded the case—which we deny—that portion of its judgment suspending the rates was plainly in excess of its statutory authority.

By itself purporting to suspend the in-transit charges until further order of the court, the court below acted in contravention of this Court's decision in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658. This Court held in *Arrow* that the exclusive power to suspend rates under section 15(7) of the Interstate Commerce Act rests in the Commission and that the courts lack power to suspend rates or to extend Commission suspensions beyond the maximum period provided by the statute. Construing section 15(7), the

Court held that Congress, by fixing the period in which the Commission might suspend rates, and providing that the rates "shall go into effect at the end of such period", must have intended to foreclose judicial power to extend the period (372 U.S. at 664). As the Court stated:

> We cannot believe that Congress would have given such detailed consideration to the period of suspension unless it meant thereby to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief. [372 U.S. at 667]

As noted in *Arrow*, the Commission's power to suspend was first conferred by the Mann-Elkins Act of 1910,[28] and was a direct outgrowth of the legislative and judicial experience immediately preceding that legislation. When in 1906 the Commission was empowered by the Hepburn Act[29] to determine the validity of proposed rates, but without any coincident power of suspension, injunctions were sought in the courts against the application of such new rates, with diverse, confusing, and inequitable results. Many courts were in considerable doubt as to their power, and, as the Commission itself noted at the time, economic hardship was frequently visited on those shippers which were not able to secure injunctive relief—relief which at times, could even depend on the ability of an aggrieved party to file a bond (372 U.S. at 663-664). Moreover, different

[28] 36 Stat. 539, 552.

[29] 34 Stat. 584, 589.

courts at times reached different conclusions with regard to the same rate change, resulting in disparity of treatment as between different shippers, carriers, and sections of the country (372 U.S. at 664).

The solution adopted by Congress represented a compromise between conflicting interests. The basic right to initiate rate changes was left with the carrier, and the Commission was empowered to declare such rates unlawful only after full investigation. But to protect shippers and others who might otherwise be required to pay a rate later found unlawful, the Commission was granted the power to suspend the rate proposal pending its investigation. For the protection of the carriers, however—who would be deprived of the revenues and other benefits to be derived from the rate change during the suspension period—the length of time during which such suspensions might remain in effect was explicitly limited;[30] and in 1920 a provision was added to specify that the rate "shall go into effect at the end of such period" whether or not the investigation had been concluded. Recognizing that this might result in a shipper's having to pay rates which were put into effect at the end of the suspension period but later found unlawful, Congress in 1920 added a further provision (which exists to this day) authorizing the Commission to order carriers to keep

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[30] The Mann-Elkins Act of 1910 authorized the Commission to suspend rates for an initial period not exceeding 120 days, with a discretionary power to extend that period for an additional six months (36 Stat. 552). In 1920, the Esch-Cummins Act cut the authorized period of extension to 30 days (41 Stat. 486-487). In 1927, the time period was altered to its present form, authorizing suspension for a maximum of seven months (44 Stat. 1447-1448).

an accounting of charges so collected and to make refunds if the rates are ultimately found unlawful (41 Stat. 484, 486-87; see 372 U.S. at 664-65).

Analyzing this legislative history, this Court in *Arrow* concluded that it was the intention of Congress "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injuctive relief" (372 U.S. at 667). To believe otherwise, as the Court stated, would mean that Congress ". . . intended to give backhanded approval to the exercise of a judicial power which had brought the whole problem to a head" (372 U.S. at 664). This Court further adverted to the "close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates," and concluded that this "relationship suggests it would be anomalous if a Congress which created a power of suspension in the Commission because of the dissonance engendered by recourse to the injunction nevertheless meant the judicial remedy to survive" (372 U.S. at 668).

Arrow, of course, differs factually from the instant case in that there the judicial suspension of rates was sought while the case was still pending before the Commission in the first instance, while here the suspension has been imposed while the case is pending before the Commission on remand. But, as Judge Friendly recognized in *National Small Shipments Traffic Conference* v. *United States,* 321 F. Supp. 500 (S.D.N.Y.), this is not a material difference such as would negate application of the *Arrow* rule. In a well-reasoned decision directly in conflict with the lower court's decision

here, the district court in *National Small Shipments*,[31] after reviewing a final Commission decision approving certain rates and holding the Commission's order invalid, considered the question of its power under *Arrow* to order the rates suspended pending reconsideration by the Commission, and concluded (321 F. Supp. at 515):

> The tariff has already been suspended for the full period allowed by Section 216(g), indeed even longer as a result of the carriers' agreement; and the rates were placed in effect as a result of the carriers' action, not the Commission's. If the Commission had simply failed to conclude its investigation before the end of the suspension period and the carriers had placed Tariff 500 in effect, Arrow Transp. Co. v. Southern Ry., 327 U.S. 658 (1963), would clearly preclude us from enjoining application of the rates. We see no relevant difference with respect to our power to do this in the fact that the Commission here concluded its labors and found, although without adequate justification in our view, that the carriers had sustained their burden of showing the rates to be just and reasonable. In neither situation can we direct the Commission to reinstitute a suspension which had already continued as long as Congress allows.

Appellees now suggest that the judicial suspension of rates was not even at issue in *Small Shipments*,

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[31] The *Small Shipments* case involved § 216(g) of the Act (49 U.S.C. 316(g)), which applies to motor carriers. The statutory suspension language of § 216(g) is the same as that of § 15(7).

plaintiffs therein having requested only an injunction against the Commission's order (Wichita Motion, p. 12). But, as Judge Friendly noted in that decision (321 F. Supp. at 515), an injunction against the rates could well have been apprehended by such a request for relief, and his opinion represents a complete disposition of the issues present in the case.[32] *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp. 72 (S.D. Calif.), is not to the contrary, since the issue here, later decided by *Arrow* and *Small Shipments,* was intentionally not disposed of in that case.

The basic compatibility of the *Small Shipments* decision with the underlying rationale of *Arrow* is evident. The impropriety of judicial suspension is no less apparent upon remand of the case than at any other time in the rate-making process; the fact that the lawfulness of the rate proposal is again before the Commission, as the result of a reversal of its original decision by the reviewing court, simply has no bearing on the issue of whether judicial suspensions should be permitted. *Small Ship-*

[32] Appellees suggest further that the Commission in *Small Shipments* exercised a suspension power in excess of the statutory period by directing cancellation of the rates after the court's remand (Wichita Motion, p. 14). This is inaccurate. The carriers there were given a choice between cancellation of the rates and the institution of a new proceeding, or the acceptance of an accounting and refund provision pending further hearings in the existing proceeding, and they chose the former.

Appellees also contend that the court's decision in *Small Shipments* is distinguishable from the case at bar because there the court's action was "inimical to a remand" (Wichita Motion, p. 12). This also is inaccurate. As the Court held in *Small Shipments,* (321 F. Supp. at 316), "We therefore vacate the Commission's determination that the rates and charges under Tariff 500 are just and reasonable and direct it to take further proceedings in a manner not inconsistent with this opinion."

ments, supra. In either event, no final decision on the justness and reasonableness of the proposed rates has yet been reached, and the adverse effects of judicial suspension mentioned in *Arrow* can result in the one stage of the proceedings no less than in the other.

This Court in *Arrow* noted the disparity of treatment as between different shippers, carriers, or sections of the country that could result from the judicial exercise of a suspension power while the proceeding was pending before the Commission in the first instance. The same problem exists if that suspension power is exercised in connection with a remand of the proceeding following judicial review. Under the Urgent Deficiencies Act,[33] which governs review of Commission decisions, any number of suits may be brought in district courts throughout the nation, seeking review of the same Commission decision. And the courts reviewing such decision may, of course, reach differing results. In the event a Commission decision is sustained by one court and reversed by another, the exercise of the suspension power by the reversing court would either result in disparate treatment of different shippers (if the suspension were limited in scope)[34] or, if unlimited, in the

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[33] 28 U.S.C. 2284, 2321-2325; 62 Stat. 968-970.

[34] Compare *United States* v. *Florida East Coast Railway*, No. 70-279, Oct. Term, 1972, now pending before this Court, in which a Commission decision establishing incentive per diem charges (as to which the suspension provisions of the statute are inapplicable) was sustained by a district court in New York (318 F. Supp. 490) and reversed by a district court in Florida (322 F. Supp. 725). The result is that during the pendency of the Government's appeal to this Court, application of the incentive per diem charges has been enjoined as to two railroads (the Florida East Coast and the Sea-

implicit negation by one court of the other court's decision.

Moreover, even as primary jurisdiction was a factor in *Arrow*, so it was in *Small Shipments* and so it is here.[35] The district court did not purport itself to finally determine the justness and reasonableness of the proposed changes; instead it remanded this case to the Commission. It is clear that any such future decision would be an exercise of administrative discretion within the special competence of the Commission to make. *Cf. Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134. There is no perceivable difference between an agency's primary jurisdiction after remand and that exercised initially; the "nexus" between the suspension power and primary jurisdiction is the same in either situation.

The sweeping power of judicial suspension asserted here by appellees finds no support in the available authorities. Relying on a footnote in *Arrow* (372 U.S. at 671, n.22), in which this Court stated that it takes no position on the propriety of "decisions recognizing a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action . . .", appellees claim support for a judicial suspension *after* review is completed, pending remand to the agency, and even until further order of the district court itself (USDA Motion, p. 10;

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board Coast Line) but is in effect as to all other railroads in the Nation.

[35] Appellee Secretary of Agriculture seems to recognize the relevance of the primary jurisdiction doctrine; see USDA Motion to Affirm, pp. 10-11.

Wichita Motion, pp. 9-10). No such conclusion can fairly be drawn in view of the underlying bases of the *Arrow* decision.[36]

The pernicious practical effects of judicial suspension are clearly illustrated by this very case. Notwithstanding the Commission's unchallenged findings that in-transit inspection charges are an effective device to increase car supply and to accelerate the movement of grain—findings borne out by actual experience under the rate—the district court chose to suspend these charges. Without any notice or explanation, without even any request for such action from any party, the court in one short sentence took a measure with enormous transportation significance. This is precisely the type of action which this Court in *Arrow* sought to prevent.

It is settled that ". . . the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the Commission for reconsideration." *Federal Power Comm'n* v. *Idaho Power Co.*, 344 U.S. 17, 20. See also *United States* v. *Saskatchewan Minerals*, 385 U.S. 94, 95. By suspending the charges, not only pending reconsideration but even until further clearance from the court itself, the court below clearly exceeded its mandate.

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[36] *Ad Hoc Comm. on Consumer Protection* v. *United States*, 313 F. Supp. 119, 126 (D. D.C.), also relied on by appellees (Wichita Motion, pp. 10-11), is inapposite for the same reason.

CONCLUSION

The judgment of the district court should be reversed, and the case remanded with directions to sustain the Commission's orders under review.

Respectfully submitted,

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JANUARY, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72–214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

No. 72–433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

MEMORANDUM FOR THE UNITED STATES

These are appeals by 34 railroads (No. 72–214), and by the Interstate Commerce Commission (No. 72–433), from a decision of a three-judge district court (Railroad J.S. App. C1) setting aside an order of the Interstate Commerce Commission. The Commission had found lawful tariffs establishing new charges for in-transit inspection of grain (Railroad J.S. App. A1,

B1). The district court ruled that the Commission had failed to explain adequately its departure from the standards it has long employed to determine the reasonableness of charges for accessorial services which had formerly been included in the line haul rate. It remanded the case to the Commission for further proceedings. But in addition, the court ordered that the tariffs, which became effective on May 4, 1971, be suspended "until and unless otherwise ordered by this Court" (Railroad J.S. App. C7).

In the district court, the Secretary of Agriculture intervened as a plaintiff pursuant to 7 U.S.C. 1291(b) and the United States filed a neutral answer. The United States does not now question the merits of the district court's decision. However, the district court's remedial order suspending the tariffs pending proceedings on remand has injected a new issue into the case. That issue involves the scope of the district courts' powers to suspend railroad tariffs following review proceedings under the Urgent Deficiencies Act, 28 U.S.C. 2321–2325. This remedial question is of a recurring nature and is of substantial importance to rail carriers and shippers. The United States therefore, as statutory defendant in proceedings under the Urgent Deficiencies Act, submits this memorandum setting forth its views on the remedial issue only.

Under Section 6 of the Interstate Commerce Act, 49 U.S.C. 6, the initiative and the responsibility for filing and publishing tariff charges is vested in the rail carriers. A change proposed by the carriers goes into effect after 30 days' notice (49 U.S.C. 6(3)) unless it is set down for investigation by the Commission and

suspended under Section 15(7), 49 U.S.C. 15(7). That Section provides that tariff changes proposed by the carriers are subject to investigation by the Commission on complaint or on its own initiative, and that the carriers have the burden of showing that the proposed change is just and reasonable. In such investigations the Commission may suspend a tariff for not more than seven months. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change * * * shall go into effect at the end of such period * * *." 49 U.S.C. 15(7). The revenues lost to the carriers during the seven-month suspension period are not recoverable by them even if their proposed change is subsequently sustained. However, if the tariff is placed in effect by the carriers on expiration of the suspension period, the Commission may require an accounting and refund to shippers upon an ultimate finding by it that the increases were not justified, 49 U.S.C. 15(7). In addition, even without a Commission accounting order, shippers may obtain reparation under Sections 8 and 9 of the Act, 49 U.S.C. 8 and 9.

The statute on its face, therefore, imposes upon carriers for a seven-month period an irrecoverable loss of revenue even if their proposed rate increase was lawful. After the suspension period, either prevailing side may recover—the carriers by retaining revenues received after the tariff went into effect, the shippers by reimbursement either by refund under Section 15(7) or by reparations under Sections 8 and 9. The decision of the district court disturbs this carefully balanced distribution of economic burdens between

carriers and shippers. By ordering on remand a further suspension period, beyond the seven months authorized by Congress, the court imposes a further permanent loss of revenue on the carriers.

Undoubtedly there will be particular cases in which shippers will suffer severe business injury as a result of increased rates going into effect while under investigation by the Commission, even though reimbursement is available to them if they ultimately prevail. Such a claim is advanced by the appellees here, who assert that they will be forced out of business by the increased inspection charge even if their objections are ultimately sustained. But after careful consideration, we have concluded that the statutory scheme, read in the light of this Court's opinion in *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, compels vacation of the remedial order issued by the court below.

The question in *Arrow* was whether Section 15(7) barred a single-judge district court from extending a suspension prior to the issuance by the Commission of a reviewable final order. This Court, grounding its decision in the historical origin of the statute, held that Section 15(7) did bar such relief. Prior to 1910, the Commission had no suspension power at all. However, the federal district courts, upon the request of shippers, frequently enjoined such rate increases pending the issuance of a final Commission order. This procedure was unsatisfactory in several respects. First, the injunctions typically issued only on behalf of a few major shippers; smaller shippers who had

been unable to join the suit remained subject to the higher rates and were therefore left at a competitive disadvantage. Second, the district court frequently lacked jurisdiction over some of the carriers who had put the new rates in effect; injunctions running only against some carriers resulted, in effect, in territorial discrimination. Third, different district courts sitting in different jurisdictions sometimes reached conflicting conclusions as to the reasonableness of the same proposed rates; the pattern of rates resulting in such circumstances had no rationality and was nearly impossible for the carriers to administer. In short, prior to 1910 the pattern of rates, pending a Commission order, was too frequently inequitable and economically irrational. This was inconsistent with the congressional goal of a national railroad system characterized by a coherent and uniform rate structure. Section 15(7) was the congressional response to this problem. Congress sought in Section 15(7) to provide the uniformity which had previously been lacking in this aspect of national transportation policy. See, generally, *Arrow Transportation Co.* v. *Southern Ry. Co.*, *supra*, 372 U.S. at 662–669.

On the basis of this history, this Court concluded in *Arrow* that by enacting Section 15(7) Congress not only gave the Commission a limited power to suspend the effectiveness of proposed rate schedules pending hearing and decision but also impliedly divested the courts of any such power. The Court further noted that this reading of the statutory history was buttressed by considerations of general principles of

judicial review of administrative proceedings (372 U.S. at 669–671):

> A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the admintrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review.* * * Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.

It has been suggested that the *Arrow* result should be confined to judicial suspension of tariffs prior to entry of the Commission's final order and that a court reviewing a final order has full powers to suspend pending further Commission proceedings on remand. *Ad Hoc Committee on Consumer Protection* v. *United States*, 313 F. Supp. 119, 124 (D.D.C.). There a two-judge emergency panel of the court of appeals for the District of Columbia Circuit (which had no jurisdiction and was referring the case to the three-judge district court) indicated that upon review the district court would have power to enjoin tariffs which the Commission had finally sustained. That decision directly conflicts with the opinion of the three-judge court in *National Small Shipments Traffic Conference* v. *United States*, 321 F. Supp. 500, 515 (S.D. N.Y.). However, neither decision closely examined the statu-

tory scheme or this Court's reasoning in *Arrow* which, in our view, lead to the conclusion that a judicial order directly suspending a tariff after a final Commission decision (1) impinges upon the Commission's primary jurisdiction, and (2) raises the same risks of non-uniform results that attend judicial suspension prior to entry of the Commission's final decision.

To preserve the primary responsibility of an administrative agency for determining the public interest under the statute it administers, this Court has held that the functions of a reviewing court are limited to laying bare the agency's error and then remanding the case to it for determination under the correct standards and procedures. *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201. Thus if the district court had here ordered the Commission to disapprove the tariff change sought by the carriers, it would be violating the rule that such matters are exclusively for the Commission to decide. *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transportation Co.* v. *Cincinnati, N.O. & T. Pac. Ry.*, 379 U.S. 642. But an order suspending tariffs on remand would also "seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable." *Arrow Transportation Co.* v. *Southern Ry. Co.*, *supra*, 372 U.S. at 669–670. And, as this Court further noted in *Arrow* (372 U.S. at 670), "such consideration * * * [creates] the hazard of forbidden judicial intrusion into the administrative domain."

There would also be a significant danger of non-uniform results if reviewing courts were permitted

to suspend tarrifs pending further proceedings. Under the Urgent Deficiencies Act, there is no time limit for suits challenging orders of the Commission nor is there any provision for consolidation of review proceedings involving the same Commission order. Consequently, different courts can and do reach different results in suits by different parties concerning the same order. See *New York Central R. Co.* v. *United States*, 200 F. Supp. 944, 950 (S.D. N.Y.); *Denver & R. G. W. R. Co.* v. *Union Pacific R. Co.*, 351 U.S. 321, 326–327; compare *United States* v. *Florida East Coast Railway Co.*, No. 70–279 (argued December 7, 1972), with *Long Island R. Co.* v. *United States*, 318 F. Supp. 490 (E.D. N.Y.). This creates a serious risk of non-uniform results with respect to judicial suspension of the same tariffs pending remand of the same order by different courts. Such lack of uniformity would of course upset the basic statutory purpose delineated by this Court in *Arrow*.

In addition, judicial suspension of tariffs creates procedural problems. In the present case the district court could not order the Commission to suspend the tariffs on remand because the Commission has no power to order a further suspension period. Instead, because the railroads had intervened as parties in support of the Commission's order, they were directly enjoined from implementing their tariffs. If the railroads had not intervened, then the district court could not have enjoined them.[1] To threaten carriers with

[1] Because of the venue provisions of 28 U.S.C. 1398(a), which state that suits to enjoin Commission orders may be brought "only in the judicial district wherein is the residence or principal office of any of the parties bringing the action," it would not be feasible for plaintiffs to join all interested railroads as involuntary parties.

suspension as the price of intervening in support of orders in which they have a substantial interest is to impose a serious disadvantage on their exercise of the statutory right to intervene (28 U.S.C. 2323). Under the Urgent Deficiencies Act, only the United States is a necessary statutory defendant (28 U.S.C. 2322) and only the Commission's order is before the Court. While the order itself may be enjoined and set aside, neither the Urgent Deficiencies Act, the Interstate Commerce Act, nor the judicial review provisions of the Administrative Procedure Act (5 U.S.C. 701–706) provide for suspension of tariffs following conclusion of the review proceedings.[2]

The effect of the district court's order on the merits is to remand the case to the Commission to reopen the investigation. Congress has provided for only one seven-month suspension period during that investigation, and that one period has expired. Since the Commission cannot enlarge or renew it, it follows, *a fortiori*, that a court cannot do so. For in Section 15(7) Congress has declared suspension to be exclusively an administrative responsibility to be exercised within specific limits.[3]

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[2] In *Arrow* this Court carefully preserved the power of reviewing courts to maintain the *status quo* pending review by granting temporary relief. 372 U.S. at 671, n. 22. Under the scheme of the Act, however, the new tariffs are implemented, as they were in the present case, prior to review of the Commission's final order. See 49 U.S.C. 6(1), 15(7). An order by a reviewing court suspending the new tariffs thus has the effect of changing the *status quo*.

[3] If the Commission in its discretion decides not to suspend a tariff at all pending its investigation, its decision is not reviewable. *Arrow Transportation Co.* v. *Southern Ry. Co.*, *supra*, 372

CONCLUSION

For the reasons stated, the district court's order should be set aside insofar as it suspends the carriers' tariffs pending further proceedings on remand.

Respectfully submitted.

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JANUARY 1973.

U.S. at 670, n. 21; *Port of New York Authority* v. *United States*, 451 F. 2d 783, 786–789 (C.A. 2).

It might be argued that since, under Section 15(7), carriers have the burden of justifying proposed tariff changes, if a court finds unsupported by substantial evidence the Commission's determination that they have done so, then the carriers should not have the right to collect any increases pending further Commission proceedings. But that is not this case. The ruling here was set aside because the district court found that the Commission had not adequately explained its ruling here in light of its earlier precedents. It was not a failure of proof by the carriers (under the Commission's newly adopted standard), therefore, but the court's finding of administrative error (in the Commission's failure to justify its apparent change of standards) which resulted in the remand. In these circumstances at least, the congressional policy of permitting the increase to remain in effect pending the Commission's investigation is compelling. For it was especially to protect the carriers from delays in the administrative process for which they were not responsible that Congress provided in 1920 that tariffs should become effective upon expiration of the suspension period.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL., APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

BRIEF OF THE SECRETARY OF AGRICULTURE

QUESTIONS PRESENTED

1. Does the fact that a proceeding involves a large number of rates relieve the Interstate Commerce Commission of its statutory obligation to determine their reasonableness under established standards?

2. Does a level of rates originally prescribed by the Interstate Commerce Commission in 1934 but substantially increased by the railroads over the years in a series of non-prescribed, non-reviewable ex parte increases constitute a prescribed level of rates against which the reasonableness of the rates and charges here in issue may be gauged?

3. Does a three-judge district court have jurisdiction, ancillary to review of a final order of the Interstate Commerce Commission approving a new charge, to enjoin collection of the charge upon a finding that the order of the Commission is not supported by substantial evidence?

STATUTES INVOLVED

The statutes involved are Title 28 U.S.C. §§ 1651(a), 1336(a), 1398, 2284 and 2321–2325; Title 5 U.S.C. § 706; and sections 1(5), 13(1), 15(1), 15(7) and 15a (2) (49 U.S.C. §§ 1(5), 13(1), 15(1), 15(7) and 15a (2)) of the Interstate Commerce Act. These statutes are set forth in the Appendix hereto.

INTEREST AND POSITION OF THE SECRETARY OF AGRICULTURE

By section 201 of the Agricultural Adjustment Act of 1938, 52 Stat. 36, 7 U.S.C. § 1291, the Secretary of Agriculture is authorized to make complaint to the Interstate Commerce Commission with respect to rates, charges, tariffs, and practices relating to the transportation of farm products, and to prosecute the same before the Commission. The statute confers upon the Secretary the rights of a party before the

Commission and the rights of a party to invoke and pursue original and appellate judicial proceedings involving the Commission's determination. See *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 647 n. 1; *Secretary of Agriculture* v. *U.S.*, 350 U.S. 162, 163 n. 1. The Secretary actively opposed the surcharge here in issue before the Commission and joined appellees Wichita Board of Trade, et al. in the successful effort to have the Commission's order set aside and collection of the contested surcharge enjoined by the district court.

As the Commission has recognized, under the present grain marketing practice, the price received by the farmer is the market price less the local or gathering rate to the market. This, in effect, requires the farmer to bear the transportation cost. *Increased Freight Rates*, 1968, 332 ICC 714, 751. Any increase in that transportation cost is directly translated into a reduction in the price the farmer receives for his grain. In this case, the surcharge approved by the Commission effects a reduction of approximately one cent per bushel in the price the farmer receives for his grain.

In practice the farmer sells his grain to a country elevator and receives the price at the market that day less the elevator operator's commission and the total rail transportation charges, including the inspection charge, to the market. As to the farmer, the transaction is then complete and he is a stranger to the subsequent transactions which result in further sales of the grain and its movement to the market. For this

reason, he is not protected by the refund provision which the Commission is authorized to impose upon the railroads under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), nor is he protected by the refund provision upon which this Court conditioned its stay of the judgment of the district court.

As the Commission observed, (App. 30), the Secretary does not oppose the concept of a separately stated inspection charge. However, he has consistently maintained that such a charge must be justified by the railroads, before the Commission, upon a record developed in consonance with the standards which the Commission has established and, heretofore, consistently applied for over half a century. In addition, the Secretary does not take issue with this Court's decision in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658. However, he does not view that decision as a bar to the availability of equitable relief which is expressly provided for under the statutory scheme devised by Congress for judicial review of final action by the Commission. 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325.

STATEMENT

These are direct appeals under 28 U.S.C. § 1253 from a decision of a three-judge district court (App. 100) which remanded to the Interstate Commerce Commission the latter's decision and order in I. & S. Docket No. 8548, *Inspection in Transit, Grain and Grain Products*, 339 ICC 364, 340 ICC 69 (App. 6 and 64, respectively), approving the imposition by the railroads of a separate charge for stopping carloads of grain in transit for inspection.

The Commission proceedings arose out of tariffs filed with the Commission by appellant railroads in February, 1970 proposing to establish a separate charge of $13.36 per car for the first stop in transit for inspection, a service which for many years had been embraced in the line-haul rates. At the hearing, the railroads stipulated that the cost of providing the first stop in transit for inspection was being recovered in the line-haul rates. However, noting the critical shortage of railroad cars and the fact that a 1968 amendment of the United States Grain Standards Act, 82 Stat. 761, 7 U.S.C. § 71 *et seq.*, had eliminated the requirement for official inspection of interstate grain movements, they urged the Commission to approve the proposed surcharge as a penalty to discourage and hopefully prevent grain shippers from availing themselves of the inspection privilege theretofore properly theirs under the applicable tariffs. The railroads presented evidence to show that the proposed surcharge roughly approximated the cost of the inspection service. They also presented estimates as to the increased availability of cars which would attend elimination of the service. However, notwithstanding the fact that cancellation of the availability of the service under the line-haul rates effected an increase in those rates, they presented no evidence to justify the increase. Further, they presented no evidence as to the insufficiency of the line-haul rates to cover the total transportation service provided, including the inspection, a showing which the Commission for many years had required as a prerequisite to approval of a separate charge for any portion of the total transportation service.

Protestants pointed out that the 1968 amendments to the United States Grain Standards Act were proposed by the Secretary of Agriculture in response to enforcement problems and to alleviate the burden mandatory inspection imposed upon grain merchandisers who moved large volumes of grain between their own storage facilities. Improvements in car utilization were contemplated only as a minor fringe benefit and in no event were the amendments designed to eliminate in-transit inspections, a result which the Secretary of Agriculture would have opposed vigorously. (V.S. 60, Tr. 757, 790).

In view of the stipulation by the railroads that the cost of the inspection service was already covered by the line-haul rates, the protestants, including the Secretary of Agriculture, opposed the additional surcharge, because, absent adjustment of the line-haul rate, it would result in a double charge for a single service. See *Inter Com Commis'n* v. *Chicago & Q R'D Co.,* 186 U.S. 320, 337. In addition protestants relied on the long established Commission principle that in order to prove such a charge just and reasonable under section 1(5) of the Interstate Commerce Act, 49 U.S.C. § 1(5), the railroads had the burden under section 15(7) of the Act, 49 U.S.C. § 15(7), to demonstrate the insufficiency of the line-haul rates to cover it, or, conversely, that the total transportation charges resulting from addition of the separate charge to the line-haul rates are just and reasonable. *Lighterage and Storage Regulations at New York,* 35 ICC 47, 61; *Manure from Jersey City, N.J.,* 40 ICC 465, 469; *Re-*

consignment Case No. 3, 53 ICC 455, 468; *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677, 682; *Unloading Lumber at New York Harbor*, 256 ICC 463, 468; *Transit Charges, Southern Territory*, 332 ICC 664, 683. See also *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 652.

By report and order served April 21, 1971 (App. 6), the Commission's Division 2 found the proposed charge just and reasonable and otherwise lawful and discontinued the proceeding. Division 2 concluded that the in-transit inspection was neither mandatory nor essential to the orderly marketing of grain, that the evidence of the cost of the inspection stop adduced by the railroads justified the amount of the charge, that the charge would increase car utilization by eliminating the delays which attend inspection, and that its rule established in prior decisions requiring proof of the reasonableness of the total resulting charges was distinguishable because (1) the instant proceeding involved so many rates as to render such a requirement impractical and (2) the charge when added to the line-haul rate would not exceed the maximum level of rates prescribed by the Commission in Docket No. 17000, (Part 7), *Grain and Grain Products*, 205 ICC 301, 215 ICC 83. In a report and order on reconsideration served September 29, 1971, 340 ICC 69 (App. 64), the full Commission reaffirmed the earlier decision of Division 2.

Appellees brought this action in the United States District Court for the District of Kansas seeking to have the order of the Interstate Commerce Commis-

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sion annulled, enjoined and set aside. The district court held that the Commission had, without adequate justification, departed from the long-standing principle established in the above-cited cases and remanded the matter to the Commission for further proceedings. The district court also enjoined collection of the contested surcharge pending further order of the court.

Appellants filed motions for correction of opinion arguing that the lower court was without jurisdiction to enjoin collection of the charges. The district court entered an order denying these motions on June 8, 1972 (App. 108).

On June 9, 1972, the railroad appellants filed their notice of appeal with the district court (App. 109) together with a motion for stay of judgment pending disposition of the appeal. That motion was denied on June 19, 1972. Thereafter, the railroads, supported by the Commission, applied to this Court for a stay, which was granted on July 7, 1972 (App. 111). On July 20, 1972, the Interstate Commerce Commission filed its notice of appeal (App. 113). This Court noted probable jurisdiction and consolidated the two appeals on November 13, 1972.

SUMMARY OF ARGUMENT

I

The Interstate Commerce Commission approved imposition by the railroads of an additional charge for stopping carloads of grain in transit for inspection. That service had previously been provided under the line-haul rates and the railroads admitted at the hear-

ing that those rates contain compensation for the service. In a long line of decisions dating back over fifty years, the Commission has consistently held such charges to be unlawful unless the railroads could prove that their line-haul rates were not sufficient to recover the cost of providing the total transportation service, including the portion thereof for which a separate charge was proposed. See, e.g., *Reconsignment Case No. 3,* 53 ICC 455, 468; *Terminal Charges at Pacific Coast Ports,* 255 ICC 673, 677. The railroads offered no such proof here.

The Commission approved the charge nonetheless asserting that such a burden of proof would be intolerable in a case involving as many rates as this one. Instead of imposing the burden of proof heretofore required, the Commission simply coupled the proposed charge with the currently effective line-haul rates and, noting that in most cases the resulting total did not exceed the level prescribed in Docket No. 17000, Part 7, found the proposed charge just and reasonable.

The district court properly found that the Commission had not adequately justified departure from its long standing rule. The fact that many rates are involved does not excuse failure to require at least typical evidence upon which the Commission could have based an informed judgment as to the reasonableness of the charge. See *New England Divisions Case,* 261 U.S. 184, 197–198. Further, the *prescribed* level of rates utilized as a standard by the Commission was not prescribed at all. In actuality it was the level of rates reached as a result of aggregating carrier sponsored

general rate advances over the past thirty-five years. The reasonableness of that level has never been determined and therefore it cannot be used as the sole standard against which to measure the reasonableness of the total charges resulting from addition of the inspection charge to the line-haul rates. See, e.g., *Algoma Coal & Coke Co.* v. *United States*, 11 F. Supp. 487 (E.D. Va.); *Mode-O-Day Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 325 ICC 390, 396.

Moreover, the Commission made no effort to determine the reasonableness of the now inspection-less line-haul rates notwithstanding the fact that they contain compensation for the inspection service. This, too, is a departure from prior norms for which the Commission offered no adequate justification. See *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677; *Cancellation of Wharfage Absorption*, 335 ICC 477, 526. Considerations of car utilization do not overcome the Commission's duty to predicate approval of railroad rates and charges upon substantial evidence.

II

Congress has provided a comprehensive statutory scheme for judicial review of final orders of the Interstate Commerce Commission; and under that scheme the courts are empowered to grant injunctive relief to prevent irreparable injury. 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325. The legislative history of these provisions clearly demonstrates that Congress intended that relief to be available notwithstanding the Commission's power to suspend rates prior to determination of their lawfulness.

In *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S. 658, this Court held injunctive relief to be unavailable prior to entry of an order by the Commission upon completion of its inquiry into the lawfulness of proposed rates. However, the Court carefully confined the reach of its decision to that situation. The *Arrow* decision does not bar equitable relief upon judicial review of such order. *Ad Hoc Com. on Consumer Protection* v. *United States*, 313 F. Supp. 119, 124 (D.D.C.).

In view of the fact that the line-haul rates compensate the railroads for the inspection service, the addition thereto of a separate inspection charge results in a double charge for a single service. The transportation cost comes out of the price the farmer receives for his grain. He therefore bears the double charge although in most cases he has no direct connection with the transportation. If injunctive relief be denied, the farmer has no recourse because he has no alternative remedy.

ARGUMENT

I. THE DISTRICT COURT PROPERLY HELD THAT THE INTERSTATE COMMERCE COMMISSION HAD NOT ADEQUATELY EXPLAINED ITS DEPARTURE FROM PRIOR NORMS

A. IN APPROVING A SEPARATE CHARGE FOR A SERVICE ALREADY BEING PERFORMED AT THE LINE-HAUL RATE, WITHOUT REQUIRING INQUIRY INTO THAT RATE AND THE AMOUNT OF COMPENSATION INCLUDED THEREIN FOR THE PERFORMANCE OF THE SERVICE, THE COMMISSION DEPARTED FROM OVER FIFTY YEARS OF PRECEDENT

Where the railroads seek to establish a separate charge for a service theretofore encompassed in the line-haul, the Commission has for over fifty years re-

quired them to first demonstrate that the line-haul rate is insufficient to compensate them for the total transportation, including the service to be segregated. Stated conversely, it is the carriers' burden under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to demonstrate that not only the separate charge but also the total transportation charges resulting from its addition to the line-haul rates are just and reasonable. See *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 682.

The principle was articulated in *Lighterage and Storage Regulations at New York*, 35 ICC 47, 61, where with reference to a terminal service the Commission held:

> (W)here a terminal service has heretofore been treated by the carriers as a part of the transportation service covered by the freight rate, and regularly performed by them, they may not now segregate that service and assign to it a separate charge without taking into consideration, in order to justify such charge, the entire through service of which it forms a part and the compensation heretofore received for such through service.

The principle was extended to inspection of grain in transit in *Reconsignment Case No. 3*, 53 ICC 455, 468, and has been consistently followed in similar cases since that time. *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677, 682; *Unloading Lumber at New York Harbor*, 256 ICC 463, 468; *Transit Charges, Southern Territory*, 332 ICC 664, 683. See also, *Sec'y of Agriculture* v. *United States*, 347 U.S. 645, 652.

In the present case, however, the Commission failed to follow this established rule. Instead, and without

repudiating its prior decisions, it attempted to distinguish the present case from *Transit Charges, Southern Territory, supra,* the most recent of the above-cited line of cases, in which a similar charge was held unlawful. The Commission stated that "a requirement that the reasonableness of the proposed charges cannot be determined without 'reference to the line-haul rates, the services furnished thereunder, and the cost thereof,' effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a change" because of the thousands of individual line-haul rates involved. (App. 37). The Commission further held the more significant distinguishing feature to be that the line-haul rates when coupled with the inspection charge do not exceed the maximum level prescribed in Docket No. 17000, Part 7.

B. THE INTERSTATE COMMERCE COMMISSION DID NOT ADEQUATELY EXPLAIN ITS DEPARTURE FROM PRIOR NORMS

1. The fact that a proceeding involves a large number of rates does not relieve the Interstate Commerce Commission of its statutory obligation to determine their reasonableness under established standards

The district court perceived that the Commission was, in effect, excusing the railroad appellants from meeting their substantial burden of proof requirement because of their supposed inability to do so, and correctly rejected this rationale. (App. 103–104). The fact that a long-standing rule establishing a burden of proof may prove onerous in a particular proceeding is no justification for relieving the railroads entirely of their obligation to carry that burden.

The suggestion of the Interstate Commerce Commission that an impossible burden would be placed upon the railroads if they were required to adjust their line-haul rates by the amount of the compensation included therein for the inspection service is not sound. The Commission long ago devised a judicially acceptable solution to this problem by requiring introduction of typical evidence representative of the rate structure as a whole. See e.g., *New England Divisions Case*, 261 U.S. 184, 197–198. It was the statutory obligation of the Commission to determine the reasonableness of the charge consonant with the standards and procedures it had developed over the years in similar cases. The Commission may, of course, revise and adapt those standards and procedures to meet changing situations. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652. Here, however, the Commission made no attempt to adapt its standards and procedures to the situation with which it was confronted. Rather, it simply abandoned its statutory obligation to determine the reasonableness of the total transportation charges resulting from the new inspection charge superimposed upon the line-haul rate which for years has included an undetermined amount for the inspection service, a fact which the railroads conceded.

2. The docket No. 17000, Part 7, level of rates originally prescribed by the Interstate Commerce Commission in 1934 but now substantially increased through a series of non-prescribed ex parte increases does not constitute a prescribed level of rates against which the reasonableness of the rates and charges in issue may be gauged

Realizing, perhaps, the frailty of its rationale for departing from the rule of its prior decisions, the Commission made no mention of it in its summary of chief subsidiary findings. Instead, it predicated its approval of the charge on a finding that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket No. 17000, Part 7, *Grain and Grain Products, supra.* (App. 56.)

This finding, as it stands, is factually incorrect. What the Commission meant, as it acknowledges elsewhere in its report, is that the proposed charges when added to the line-haul rates do not exceed the maximum level prescribed in Docket No. 17000, Part 7, *supra, plus all subsequent authorized general increases.* (App. 38.) The distinction is significant, as but a single comparison readily demonstrates. The rate from Williston, North Dakota to Minneapolis, Minnesota prescribed by the Commission in 1934 was 27.5 cents per hundredweight. 205 ICC at 303. As a result of subsequent general increases, the rate between those same two points at the time the new charge became effective in May 1971 was 72.5 cents per hundredweight. This example is representative. Most, if not all of the grain shipments in the West move on rates which greatly exceed the rates prescribed in 1934 in Docket No. 17000, Part 7.

As noted above, the Commission has consistently required proof of the insufficiency of the revenues derived from the line-haul rate as a condition to approval of a separate charge for any portion of the service. It is at once obvious that comparison of the sum of the charge and the line-haul rates with the highest level of rates the Commission has ever approved does not satisfy this requirement. As the Commission stated in *Terminal Charges at Pacific Coast Ports*, 255 ICC 673, 677 "(t)heir proposal to establish an additional charge for a portion of the through services is not reasonable unless there is a clear showing that the existing rates are reasonable for the line-haul services alone, or that the increased total charges are reasonable for the aggregate services." The Commission there expressly held that proof as to the justness and reasonableness of the charge considered alone does not satisfy the railroads' burden. *Id* at 682.

The railroads suggest that the applicability of the Commission's long established principle depends upon whether or not the service sought to be segregated is part of the carrier's transportation obligation. (Railroad brief, p. 40.) However, the Commission has drawn no such distinction. See *Transit Charges, Southern Territory, supra*. As the Commission stated in *Lighterage and Storage Regulations at New York*, 35 ICC 47, 60, "the real subject of controversy is not the carriers' responsibility but the proposal to charge shippers [separately for the service.]" "Clearly, in the circumstances presented,

the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent." *Transit Charges, supra* at 683.

Assuming, *arguendo,* that the Commission may relieve the railroads of the burden of demonstrating the insufficiency of the line-haul rates, can it fairly rely instead upon a comparison of the sum of the charge and current line-haul rates with the sum of the rates prescribed in 1934 and all subsequently authorized general increases? We submit that it can not. Even if one were to assume the present vitality of a level of rates prescribed nearly forty years ago, a highly doubtful assumption in view of the radical changes in the interim, the tremendous increases in the prescribed levels which resulted from the subsequent series of general revenue proceedings were not prescribed. See, e.g., *Ex Parte No. 115,* 208 ICC 4, 60; 223 ICC 657, 750; *Ex Parte No. 148,* 248 ICC 545, 613; *Ex Parte No. 162,* 264 ICC 695, 745; *Ex Parte 166,* 269 ICC 33, 55; *Ex Parte No. 168,* 272 ICC 695, 720; *Ex Parte No. 175,* 281 ICC 557, 644; *Ex Parte No. 196,* 298 ICC 279, 347; *Ex Parte No. 206,* 299 ICC 557, 583; *Ex Parte No. 212,* 302 ICC 665, 677; *Ex Parte No. 223,* 311 ICC 373, 384; *Ex Part No. 256,* 332 ICC 280, 346; *Ex Parte No. 259,* 332 ICC 714, 792; *Ex Parte Nos. 265 & 267,* 339 ICC 125, 175; *Ex Parte No. 281,* 341 ICC 288, 331. The Commission has never regarded the general increase level as prescribed. "The authority to increase rates granted in general rate advance cases . . . does not constitute an approval of any specific rate as a maxi-

mum reasonable rate." *Des Moines Union Ry Switching,* 231 ICC 631, 669. "Rates increased pursuant to authorizations in the general increase proceedings are not prescribed rates." *Confer, Smith & Co., Inc.* v. *Reading Co.,* 297 ICC 217, 222.

In general increase cases the Commission does not prescribe the increased rates nor does it pass upon the reasonableness of any particular rate or charge. Rather it looks at the carriers' revenue needs and the general level of all rates. *Brimstone R.R. Co.* v. *United States,* 276 U.S. 104, 122. No consideration is given to the basic rate structure; only the reasonableness of the proposed additional rate segment is considered. *Tennessee Products & Chemical Corp.* v. *Alabama G.S.R. Co.,* 277 ICC 207, 216. Increases which arise out of ex parte proceedings are therefore carrier made rates, not Commission prescribed rates and are open to challenge as to their reasonableness. *Mode-O-Day Corp.* v. *Atchison, T. & S. F. Ry. Co.,* 325 ICC 390, 396. It is precisely because general rate increases are carrier made and not prescribed maxima that the general revenue orders of the Commission have been determined to be unreviewable. See *Algoma Coal & Coke Co.* v. *United States,* 11 F. Supp. 487, 494 (E.D. Va.); *Atlantic City Electric Company* v. *United States,* 306 F. Supp. 338 (S.D. N.Y.) and *Alabama Power Co.* v. *United States,* 316 F. Supp. 337 (D. D.C.), both aff'd 400 U.S. 73; *Electronic Industries Association* v. *United States,* 310 F. Supp. 1286 (D. D.C.), aff'd 401 U.S. 967.

In this case the Commission implied that notwithstanding the fact that the maximum rate level utilized

by the Commission in this case is not prescribed, it nonetheless constitutes a viable standard of maximum reasonableness because the grain rate structure has been subjected to continuing review by the Commission. The Commission relied for this proposition on *Grain and Grain Products,* 298 ICC 261; *Grain and Grain Products,* 329 ICC 824; and *Southeastern Assn. of R. & Util. Commrs.* v. *A.T. & S.F. Ry.,* 321 ICC 519. However, both of the *Grain and Grain Products* cases involved simply relief of the railroads from the mandatory rate break rule to permit them to establish non-uniform reductions for competitive purposes. Neither dealt with the maximum reasonable level of grain rates. In *Southeastern, supra,* the Commission consolidated several complaint proceedings, some of which did involve the question of whether particular assailed rates exceeded a maximum reasonable level. However, the Commission did not there essay an intensive investigation of the maximum reasonable level of all the grain rates affected by the charge here contested. Furthermore, even if it had, the Commission has since approved six general rate advances aggregating some thirty percent over the level in effect in 1964 when that case was decided. Therefore, we submit that the Commission cannot fairly utilize the ex parte rate level as a prescribed rate level obviating the necessity of inquiry into the reasonableness of the total charges resulting from addition of the inspection charge to the currently effective line-haul rates.

The Commission also cites *Grand Forks Chamber of Commerce* v. *Great Northern Ry. Co.,* 321 ICC 356, in support of its use of the ex parte level of rates as a

standard of reasonableness. (Commission brief, pp. 35, 41). However, there the inspection charge was coupled with a reduction in the line-haul rate, a factor not present in this case.

The Docket No. 17000, Part 7, level of rates certainly does not constitute a standard by which the reasonableness of the line-haul rates for those shippers who no longer take an in-transit inspection may be determined. When the Docket No. 17000, Part 7, level of rates was originally prescribed in-transit inspection was an integral part of the transportation service and compensation for such service was included in the line-haul rates. The reasonableness of the Docket No. 17000, Part 7, rates was and is therefore dependent in part upon the service which has now been taken out of the line-haul rates. Notwithstanding this rather obvious fact, the Commission failed to consider the reasonableness of the established level of rates as it applies to those shippers who no longer take advantage of in-transit inspection. They are still paying for a service which they no longer receive and upon which the Docket No. 17000, Part 7, level of rates was in part founded. It is axiomatic that when one or more of the elements which were included in the rates as originally prescribed is removed, that prescribed level of rates is no longer a valid measure of the reasonableness of the rates for the reduced service.

3. Cancellation of the inspection service without concomitant reduction of the line-haul rates resulted in a rate increase for which the railroads provided and the commission required no justification

The railroads contended before the Commission that they had no desire to collect the proposed inspection charge and that it was designed solely to eliminate in-transit inspection. However, they also stipulated that they were being compensated for the inspection service in the line-haul rate. Thus even shippers who forego inspection and avoid the separate charge continue to pay for the service under the line-haul rate. In cancelling the availability of that service under the line-haul rate, therefore, the railroads effected an increase in the line-haul rate for which they provided absolutely no justification. The Commission has consistently held it to be the burden of the carriers to justify the increase in such circumstances. See *Duluth Dockage Absorption,* 44 ICC 300, 302; *Atlas Portland Cement Co.* v. *N. & B. R.R. Co.,* 52 ICC 387, 389; *Loading of Less Than Carload Freight,* 91 ICC 394, 398. As the Commission noted in the last-cited case, "if the present rates were made to include this service . . . it would be unfair to shippers to require them to assume the entire burden and still pay the carriers for doing the work." Similarly, in *Cancellation of Wharfage Absorption,* 355 ICC 477, 526 the Commission held:

> The respondents now have in their tariffs an additive or additional charge, which they have initiated and we approved, designed to help defray port terminal expenses incurred in handling water-borne traffic. For respondents now to eliminate absorption of wharfage, which,

among other port terminal expenses, was a factor found to warrant the additive, without adjustment of the latter, would not be just and reasonable.

In approving the inspection charge, the Commission wholly disregarded the fact that those who forego the service would nonetheless continue to pay for it in the line-haul rate. Even handed justice would seem to require that the line-haul rates be proportionately reduced. See *Huron Milling Co.* v. *P.M.R.R. Co.*, 49 ICC 558, 560.

4. Considerations of car utilization are not relevant to the issue presented here as to whether the railroads proved the inspection charge to be just and reasonable

Appellants ascribe the Commission's approval of the contested surcharge largely to the laudable goal of securing increased utilization of railroad cars and thereby alleviating chronic car shortages. They contend that the Commission is obliged under the statutory rule of ratemaking, 49 U.S.C. § 15a(2), to consider the effect of rates in encouraging the more efficient utilization of cars. However, we note that neither the Commission nor the railroads give particular prominence to the provision in that section which requires the Commission to "give due consideration . . . to the need, in the public interest, of adequate and efficient railway transportation service *at the lowest cost consistent with the furnishing of such service.*" (Emphasis supplied.) Appellees do not dispute that the Commission may properly advert to the anticipated effect of a rate proposal upon car utilization. However, we do not understand appellants

to contend that such considerations justify abandonment of the traditional standards by which rate proposals must be judged. For this reason, we submit that such considerations are largely irrelevant to the issues presented here. It certainly cannot fairly be contended that, by determining that the aggregate of the inspection charge and the line-haul rates will not exceed the maximum ceiling resulting from the general revenue advances approved over the past thirty-five years, the Commission has satisfied its obligation to ensure that the total service is provided *"at the lowest cost consistent with the furnishing of such service."* (Emphasis supplied.)

The issue on appeal was the Commission's failure to consider the effect which the elimination of the performance of a first stop for inspection under the line-haul rates had upon the reasonableness of the line-haul rates. While car utilization considerations may support a finding of reasonableness for the imposition of a separate charge, on the theory that a separate charge will discourage intransit inspection, such considerations cannot justify the Commission's failure to consider the compensation already included in the line-haul rates for in-transit inspection before approving the separate charge. It is the imposition of the separate charge which tends to discourage intransit inspection, and this effect is in no way related to the level of the line-haul rates. The Commission cannot, therefore, argue that its failure to require an adjustment in the line-haul rates was in any way related to its desire to increase car utilization.

The Commission suggests that the contested surcharge is analogous to demurrage and other such charges which, in addition to compensation for use of railroad equipment, contain a penalty element designed to eliminate undue detention of cars. Such charges are justified on the basis that the shipper should be penalized for *undue* detention of cars for which the shipper is responsible. We do not dispute the power of the Commission, upon a proper record, to approve such a charge. However, in this case, there was no showing that the average of three days consumed by inspection results in *undue* detention ascribable to the fault of the shipper. Where delay is not his fault, the Commission customarily relieves the shipper of the penalty element of the demurrage charge. See, e.g., *Milburn Associates, Inc.* v. *Erie R. Co.*, 289 ICC 238, 240. We are aware of no authority, and the Commission has cited none, which would constitute precedent for the imposition of a purely punitive charge which results only in causing payments to be made to the railroads by shippers for using a service to which they are entitled under the carriers' tariffs. See *Iverson* v. *United States*, 63 F. Supp 1001, 1006, aff'd 327 U.S. 767, rehg. den. 327 U.S. 819.

II. THE DISTRICT COURT HAD JURISDICTION TO ENJOIN COLLECTION OF THE CHARGE

Appellants and the United States argue that by granting an injunction in this case the district court placed itself in square conflict with the decision of this Court in *Arrow Transp. Co.* v. *Southern R. Co.*, 372 U.S.

658, and did violence to the statutory scheme there defined. Neither contention is correct.

A. THE STATUTORY SCHEME CLEARLY PROVIDES FOR EQUITABLE RELIEF UPON REVIEW OF COMMISSION ACTION

In the Act of June 18, 1910, commonly known as the Commerce Court Act or Mann-Elkins Act, 36 Stat. 539, Congress essayed solutions to a number of railroad problems only two of which are relevant here. The first of these was the problem created by shippers who resorted to injunctions to prevent proposed increases in rates from becoming effective prior to a determination of their reasonableness by the Interstate Commerce Commission. The second problem was that created by the railroads who resorted to injunctions ancillary to appeal to the circuit courts of final Commission determinations that rate increases made effective by the railroads were unlawful. For these two problems Congress devised in the Act of 1910 entirely separate solutions. In order to relieve the problem created by shipper resort to injunctions prior to Commission action, Congress amended section 15 of the Interstate Commerce Act to empower the Commission to suspend proposed rate increases pending investigation of their lawfulness. However, the problem created by railroad resort to the various circuit courts for injunction pending review of Commission rate orders was met by confining review of Commission decisions to a Commerce Court created by the Act for the purpose, which was staffed with circuit court judges, located in Washington, D.C., and invested with the same powers, including injunctive powers, theretofore exercised by the various circuit courts.

The nature of the problem created by shipper resort to injunctions prior to Commission action was succinctly outlined by the Court in *Arrow*, 372 U.S. at 663. The Commission recommend that it be granted suspension power to meet this problem, *Twenty-First Annual Report, Interstate Commerce Commission*, 1907, pp. 9–10; *Twenty-Second Annual Report, Interstate Commerce Commission*, 1908, pp. 10–12; 45 Cong. Rec. App. 106; and Congress amended section 15 of the Act accordingly. See H. Rep. 923, 61st Cong., 2d Sess. 3–4; 36 Stat. 552.

The railroads, on the other hand, had no occasion to solicit judicial intervention prior to Commission action since the Commission could at that time investigate only rates which were in effect and then only upon complaint. Thus the railroads were content to let the Commission's investigation take its course and had recourse to the Courts only when the Commission issued an order disapproving the rates in issue. They would then seek review of the Commission's order in whatever circuit they chose and were often successful in securing from the court selected an injunction against the operation of the Commission's order. See *Twenty-Second Annual Report, Interstate Commerce Commission*, 1908, p. 20. Since at that time an order of the Commission under the statute could be effective for a maximum of two years, by securing an injunction and protracting the litigation the railroads were often able to defeat the Commission's order entirely.

While the various circuit courts reached different conclusions with respect to the Commission's rate determinations, the principal problem was the ability

of the railroads upon a declaration of irreparable injury to secure injunctions and by protracting the litigation to largely or entirely escape the Commission's order. It was believed that a single forum schooled in the complexities of transportation law would best accomplish the expedition of this litigation. 45 Cong. Rec. App. 100, 123. Therefore, Congress created the Commerce Court, located in Washington, consisting of five circuit judges and entrusted to that court exclusive jurisdiction to enjoin, set aside, annul, or suspend orders of the Commission. See H. Rep. 923, 61st Cong. 2d Sess. 2; 36 Stat. 539. The Commerce Court possessed the same powers as had previously reposed in the circuit courts, including the power to enjoin the operation of orders of the Commission disapproving rates. 45 Cong. Rec. 4716–4717, 5410, 5423–5424, 5427–5428, 8238, App. 98. See also Hearings on S. 3297 Before the Senate Committee on Interstate Commerce, 62nd Cong., 1912, p. 42.

The provisions of the Commerce Court Act relating to that court were repealed and reenacted without material change as chapter 9 of the Judicial Code of March 3, 1911, 36 Stat 1146, 1169. However, two years later the Commerce Court was abolished and its jurisdiction transferred to the eighty-six district courts by the Urgent Deficiencies Act of October 22, 1913, 38 Stat. 219. See 50 Cong. Rec. 4536, 4538. The relevant portion of that Act was drawn in large measure from the Sims bill, HR 5611, 63rd Cong. See Hearings on HR 5902 Before the House Committee on the Judiciary, 63rd Cong., 1st Sess., 1913, p. 15; Hearings on

HR 7898 Before the Subcommittee of the Senate Committee on Appropriations, 63rd Cong., 1st Sess., 1913, p. 336; 50 Cong. Rec. 4536. Abolition of the Commerce Court was vigorously opposed on the grounds that the scattering of its jurisdiction to the district courts would engender worse problems than those which led to its creation. See 50 Cong. Rec. 4536, 5418, 5421; Hearings on HR 7898 Before the Subcommittee of the Senate Committee on Appropriations, 63rd Cong., 1st Sess., 1913, pp. 62, 142, 145, 160, 213, 288. The venue provisions which would permit attack of the same Commission order in several courts were particularly objected to. *Id.*, pp. 271, 277, 278, 288–290. 50 Cong. Rec. 4536. The argument that the Commerce Court should be retained in the interest of uniformity was rejected on the ground that, in the last analysis, uniformity could only be assured by the Supreme Court. 50 Cong. Rec. 4209, 4536, 4543. See also Hearings on S. 3297 Before the Senate Committee on Interstate Commerce, 62nd Cong., 1912, p. 23. The provisions of the Urgent Deficiencies Act of 1913, including specific provision for injunction, have been carried forward substantially intact and are now found in §§ 1336, 1398, 2284, and 2321–2325 of the Judicial Code 28 U.S.C. §§ 1336, 1398, 2284, 2321–2325.

Thus, summarizing briefly, Congress sought to preserve the Commission's primary jurisdiction over railroad rates by entrusting to the Commission power to suspend proposed rate changes pending determination by the Commission of their reasonableness. On the other hand, in a separate forum under an entirely

separate statutory framework, Congress secured to persons aggrieved by the Commission's determination their right to judicial review and to equitable relief where warranted to prevent irreparable injury.

B. ARROW DOES NOT BAR EQUITABLE RELIEF UPON REVIEW OF FINAL ORDER

In *Arrow* this Court dealt only with the statutory provisions which empowered the Commission to suspend proposed rates pending investigation of their lawfulness. 49 U.S.C. § 15(7). The question presented was whether in enacting that provision Congress had intended to foreclose injunctive relief to a shipper or carrier in the event that the Commission's investigation consumed a period of time greater than the statutory period of suspension. While acknowledging the lack in the legislative history of unambiguous evidence of such a Congressional design, see 45 Cong. Rec. 6793, 7260–7264, this Court concluded that Congress had, at least impliedly, so intended. However, in so concluding, this Court confined its holding to the situation presented, i.e. judicial intervention prior to determination by the Commission of the reasonableness of the rates involved. Noting the "close nexus between the suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates," 372 U.S. at 668, the Court clearly and unequivocally distinguished that situation from a case, such as this one, in which the Commission has concluded its investigation and for which Congress expressly provided a judicial remedy, including the possibility of injunctive relief.

> A court's disposition of an application for injunctive relief would seem to require at least some consideration of the applicant's claim that the carrier's proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. *Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review.* These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. ***Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges reviewing the Commission's completed task.*** (emphasis supplied, footnotes omitted) 372 U.S. 669–671.

Further, the Court pointed out that its holding of lack of jurisdiction to intervene in aid of the Commission's jurisdiction *prior* to Commission action did not "reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the *status quo*[1] by injunction

[1] In another context this power has been held to extend to *restoring* the status quo where action following upon the Commission's order would otherwise work irreparable injury. See *Chicago Junction Case*, 264 U.S. 258, 269.

pending review of an agency's action through the prescribed statutory channels." 372 U.S. at 671 n. 22. Finally, the Court quoted with approval the statement in *Cantlay & Tanzola, Inc.* v. *United States,* 115 F. Supp 72, 83 (S.D. Cal) that "(t)he Congressional intent [underlying § 15(7)] plainly is that the courts not interfere to suspend carrier-made rates 'prior to an appropriate finding by the Interstate Commerce Commission' " 372 U.S. at 667 n. 15.

The distinction between suspension prior to Commission action and injunction thereafter had been painstakingly drawn by the *Arrow* district court in its conclusions of law which the Court of Appeals quoted with approval, 308 F. 2d 181, 183:

> CONCLUSIONS OF LAW
>
> 1. Section 15(7) of the Interstate Commerce Act grants exclusive authority to the Interstate Commerce Commission to suspend proposed railroad rates and limits that authority to a period of seven months from the proposed effective date of the rates unless further extended by consent of the carriers proposing the rates. 2. Courts are without authority to enjoin or suspend the effectiveness of rates published by common carriers subject to the jurisdiction of the Interstate Commerce Commission before the entry of a final order by the Commission approving the rates. *The only jurisdiction of a court to enjoin or suspend the effectiveness of proposed common carrier rates arises after a final order of the Interstate Commerce Commission, and this is the authority vested in a specially constituted three-judge district court,*

upon complaint filed against the United States as a necessary defendant, to review the order of the Commission. (Emphasis supplied.)

The decision of the district court was affirmed, in turn, by the Court of Appeals and by this Court. Surely, in the face of the district court's second conclusion of law, quoted with approval by the Court of Appeals, this Court was constrained to dissent had it considered the view there expressed to be erroneous.

The *Arrow* decision involves only the suspension power contained in section 15(7) of the Interstate Commerce Act. It is clearly premised upon a presumed Congressional intention to preserve in the Interstate Commerce Commission exclusive jurisdiction to suspend proposed rates incident to its primary jurisdiction to determine their lawfulness. It stands as an exception to the general rule that federal courts can employ injunctive relief to prevent irreparable injury pending such administrative determinations. *West India Fruit & Steamship Co.* v. *Seatrain Lines, Inc.*, 170 F. 2d 775 (2d Cir. 1948), cert. dis. 336 U.S. 908; *Isbrandtsen Co.* v. *United States*, 81 F. Supp. 544 (S.D. N.Y. 1948), app. dis., 336 U.S. 941; *Pennsylvania Motor T. Ass'n* v. *Port of Phila. M. T. Ass'n.*, 183 F. Supp. 910 (E.D. Pa. 1960); *Board of Governors, Etc.* v. *Transamerica Corp.*, 184 F. 2d 311 (9th Cir. 1950); *Evans* v. *International Typographical Union*, 76 F. Supp. 881, 884 (S.D. Ind. 1948). The question of the jurisdiction of a district court to award injunctive relief after the primary jurisdiction of the Interstate Commerce Commission has been exhausted was not presented to the Supreme Court in *Arrow* and the

Court specifically disclaimed any intention of ruling upon that question. The rule established in *Arrow* should not be extended to oust federal courts of their traditional power to grant injunctive relief ancillary to review of administrative orders, a power specifically preserved by Congress under the statutory scheme. See 28 U.S.C. §§ 2284(3), 2324, 2325.

Furthermore, it is settled that district courts have jurisdiction to enjoin the effectiveness of rate schedules upon review of Commission action in complaint proceedings under section 13 of the Interstate Commerce Act, 49 U.S.C. § 13, *Inland Steel Co.* v. *United States*, 306 U.S. 153. Section 15(7) of the Act, 49 U.S.C. § 15(7), empowers the Commission to make such order with reference to a proposed rate as would be proper in a proceeding initiated after the rate had become effective, i.e. upon complaint under section 13 or on the Commission's own motion under section 15(1), 49 U.S.C. § 15(1). We perceive no relevant distinction between a proceeding under section 13 and a proceeding under section 15(7) which would justify denial of jurisdiction to enjoin the effectiveness of rate schedules in the latter type of proceeding. Upon completion of Commission action, injunctive relief is available in both. Moreover, any other conclusion would render nugatory the explicit provisions derived from the Urgent Deficiencies Act which expressly provide for injunctive relief.[2]

[2] For many years shippers were denied access to equitable relief because Commission orders of the type here involved were deemed to be negative and, therefore, unreviewable. See *Procter & Gamble Co.* v. *United States*, 188 Fed. 221, rev'd

Federal Power Commission v. *Idaho Power Co.*, 344 U.S. 17, 20; *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 201; *United States* v. *Saskatchewan Minerals*, 385 U.S. 94; *Arrow Transportation Co.* v. *Cincinnati, N. O. & T. Pac. Ry.*, 379 U.S. 642; and *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, are not to the contrary. They stand simply for the general proposition that the function of the reviewing court ends when the error of law is laid bare. In other words, the reviewing court may not dictate to the agency the result it should reach on the merits. The action of the district court here remanding the case to the Commission is entirely consistent with those cases. However, they are not relevant to the question of the availability of equitable relief under the statutory scheme derived from the Urgent Deficiencies Act.

Appellants argue nonetheless that the principle established in *Arrow* should be extended to the instant situation because the broad scope of that decision has been consistently recognized in subsequent reported decisions dealing with the issue. They direct particular attention to *National Small Ship Traf. Conf., Inc.* v. *United States*, 321 F. Supp. 500, 515 (S.D. N.Y.); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745, 746 (W.D. N.Y.); *Port of New York Authority* v. *United States*,

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225 U.S. 282. However, that obstacle was removed by the decision of this Court in *Rochester Tel. Corp.* v. *U.S.*, 307 U.S. 125.

451 F. 2d 783, 786 (2nd Cir.); and *Oscar Mayer & Company* v. *United States*, 268 F. Supp. 977, 980 (W.D. Wisc.). *Port of New York Authority, supra,* and *Oscar Mayer, supra,* held unreviewable the action of the Interstate Commerce Commission vacating prior Commission orders suspending rates. The court in *Wirthmore Feeds, supra.* declined to extend the *Arrow* principle to rates published in violation of section 4 of the Interstate Commerce Act without prior Commission approval. Only the decision in *National Small Shipments, supra,* is apposite here and in that case the court held that it could not direct the Commission to reinstitute a suspension which had already continued as long as Congress allows. We do not dispute that particular holding here. The Commission's suspension power expires with the elapse of the statutory period and the court may not direct the Commission to exercise a power which it does not possess. However, that does not reach the question of the equitable powers of the court itself. We submit that the better view is that expressed by the court in *Ad Hoc Com. on Consumer Protection* v. *United States,* 313 F. Supp. 119, 124, which held that *Arrow* does not bar equitable relief after the Commission has completed its investigation.

We note also that under the statutory scheme of judicial review here in issue, three judge district courts are empowered to enjoin enforcement of Commission rate orders to prevent irreparable injury pending appeal to this Court. *Virginian Ry.* v. *United States,* 272 U.S. 658, 668–672. While the scope of judicial review may be limited, "(i)f the administra-

tive agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Scripps-Howard Radio* v. *Comm'n.*, 316 U.S. 4, 10.[2] We submit that the principle enunciated in *Arrow* constitutes no bar to equitable relief where, as here, Congress has provided expressly not only for resort to the courts but also for injunctive relief.

It is argued that remand reinstates the primary jurisdiction of the Commission and that a district court may not enjoin collection of a rate or charge without unlawfully intruding upon that primary jurisdiction. We submit that this contention is premised upon confusion of the concept of primary jurisdiction with the scope of judicial review. Primary jurisdiction assures uniformity by affording the Commission the initial opportunity to pass upon the reasonableness of rates. Upon review the court is generally limited to ascertaining whether the Commission's determination is in conformity with the statute, has a rational basis, and is supported by substantial evidence on the record as a whole. If it is not, the court must afford the Commission the op-

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[2] Appellees Wichita Board of Trade, et al. have contended that continued effectiveness of the inspection charge may well drive some of their number out of business. In these circumstances we submit that the district court might properly have resorted to the All Writs Act, 36 Stat. 1162, 28 U.S.C. § 1651(a), to preserve its jurisdiction. See *Scripps-Howard*, *supra*, at p. 10, n. 4.

portunity to correct its error. However, this in no way militates against the availability of injunctive relief to prevent irreparable injury, especially where, as here, the applicable statute contains express provisions for such relief. If the Commission's order is sufficiently final to warrant judicial review, 28 U.S.C. § 1336, it is sufficiently final to warrant injunctive relief, where appropriate, under the concomitant provisions of the explicit statutory scheme provided by Congress, 28 U.S.C. § 2325. See *Ad Hoc Com. on Consumer Protection* v. *United States*, (D.D.C.) 313 F. Supp. 119, 124.

It is suggested that the availability of judicial review and equitable relief with respect to a single Commission order in more than one district argues against sanction by this Court of the injunction here issued by the district court. However, as noted above, this objection was raised in 1913 and rejected by Congress. It is a rare occurrence and, as was observed then, in the event of conflicts uniformity would be provided by the Supreme Court. Just as the Court granted a stay here it could resolve any problems arising from inconsistent treatment by different district courts of applications for injunctive relief from the same Commission order.

The United States suggests (Memorandum p. 8) that because of the venue provisions of 28 U.S.C. § 1398 it would not be feasible to join all interested railroads as involuntary parties. This, it is asserted, argues against the jurisdiction of the district court because railroads seeking to intervene in support of

Commission orders would risk injunction of their rates. We fail to grasp the basis of this argument. The limited territorial jurisdiction of the several circuit courts was one of the principal reasons for creation of the Commerce Court and for the provision that "(i)ts orders, writs, and process may run, be served, and be returnable anywhere in the United States." 36 Stat. 541. That provision was preserved in the Urgent Deficiencies Act of 1913, 38 Stat. 220, and is now found at 28 U.S.C. § 2321. The risk of injunction of their rates is present whether or not the railroads intervene and the writ may run anywhere in the United States.

We note the suggestion of the United States (Memorandum, p. 10 n.) that:

> It might be argued that since, under Section 15(7), carriers have the burden of justifying proposed tariff changes, if a court finds unsupported by substantial evidence the Commission's determination that they have done so, then the carriers should not have the right to collect any increases pending further Commission proceedings. But that is not this case.

We submit that that is precisely this case. The railroads conceded that they were imposing an additional penalty charge for a service for which they were at least partially if not fully compensated in their line-haul rate. (Tr. 258) Under the rule established in its prior decisions, the Commission was constrained to consider the sufficiency of the line-haul rates to cover the service prior to approving such a charge. This required the railroads to submit at least representative evidence of the total costs of providing

transportation, including the service, and the total revenues derived therefrom. No such evidence was submitted and accordingly, the district court found that the railroads had failed to sustain their burden. The United States suggests that in these circumstances "the carriers should not have the right to collect any increases pending further Commission proceedings." In this case the district court agreed and enjoined collection of the inspection charge.

Finally, the United States contends (Memorandum p. 3) that shippers need not resort to injunctions because, if a rate increase is ultimately found to be unlawful, they can secure refunds under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), or obtain reparations under sections 8 and 9 thereof, 49 U.S.C. §§ 8 and 9. While these statutory provisions may protect certain shippers, they afford no remedy to the farmer who ultimately bears the inspection charge as a deduction from the price he receives for his grain. (Tr. 1299). See also Appendices to Memorandum of Secretary of Agriculture in Opposition to Application for Stay before this Court filed June 21, 1972). The railroads stipulated to the fact that the line-haul rates contain an element to cover the cost of the stop for inspection. (Tr. 231–233, 238, 258–266). The result of the Commission's order, therefore, is that the cost of the inspection is deducted twice from the price the farmer receives for his grain, once under the line-haul rate and a second time as a result of imposition of the contested inspection charge. The injury resulting from this burden is irreparable

if the district courts are without jurisdiction to grant injunctive relief.[4]

CONCLUSION

The judgement of the district court should be affirmed, the stay of that judgement vacated, and the case remanded to the Commission for further proceedings consistent with the opinion of the district court.

Respectfully submitted on behalf of the Secretary of Agriculture of the United States.

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FEBRUARY 1973.

I authorize the filing of this brief.

ERWIN N. GRISWOLD,
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[4] The inadequacy of reparations as a remedy to protect producers has long been recognized by the Commission and by Congress. See *Twenty-Third Annual Report, Interstate Commerce Commission*, 1909, 6; S. Rep. 355, 61st Cong., 2nd Sess. 8; 50 Cong. Rec. 5594.

APPENDIX

Title 28 U.S.C. § 1651(a)

§ 1651. Writs.

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Title 28 U.S.C. § 1336(a)

§ 1336. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in any part, any order of the Interstate Commerce Commission.

Title 28 U.S.C. § 1398(a)

§ 1398. Interstate Commerce Commission's orders.

(a) Except as otherwise provided by law, any civil action to enforce, suspend or set aside in whole or in part an order of the Interstate Commerce Commission shall be brought only in the judicial district wherein is the residence or principal office of any of the parties bringing such action.

Title 28 U.S.C. § 2284

§ 2284. Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days' notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may, at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules or civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

A district court of three judges shall, before final hearing, stay any action pending therein to enjoin suspend or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon ten days notice served upon the attorney general of the State.

Title 28 U.S.C. § 2321

§ 2321. Procedure generally; process.

The procedure in the district courts in actions to enforce, suspend, enjoin, annul or set aside in whole or in part any order of the Interstate Commerce Commission other than for the payment of money or the collection of fines, penalties and forfeitures, shall be as provided in this chapter.

The orders, writs, and process of the district courts may, in the cases specified in this section and in the cases and proceedings under sections 20, 23, and 43

of Title 49, run, be served, and be returnable anywhere in the United States.

Title 28 U.S.C. § 2322

§ 2322. United States as party.

All actions specified in section 2321 of this title shall be brought by or against the United States.

Title 28 U.S.C. § 2323

§ 2323. Duties of Attorney General; intervenors.

The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts.

The Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties of their own motion and as of right, and be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party.

Communities, associations, corporations, firms, and individuals interested in the controversy or question before the Commission, or in any action commenced under the aforesaid sections may intervene in said action at any time after commencement thereof.

The Attorney General shall not dispose of or discontinue said action or proceeding over the objection of such party or intervenor, who may prosecute, defend, or continue said action or proceeding unaffected by the action or nonaction of the Attorney General therein.

Title 28 U.S.C. § 2324

§ 2324. Stay of Commission's order.

The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the Action.

Title 28, U.S.C. § 2325

§ 2325. Injunction; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution, in whole or in part, of any order of the Interstate Commerce Commission shall not be granted unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

Title 5 U.S.C. § 706.

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitation, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Title 49 U.S.C. § 1(5)

§ 1. Regulation in general; car service; alteration of line.

(5) Just and reasonable charges.

All charges made for any service rendered or to be rendered in the transportation of passengers or property as aforesaid, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Title 49 U.S.C. § 13(1)

§ 13. Complaints to and investigations by Commission.

(1) Complaint to Commission of violation of law by carrier; reparation; investigation.

Any person, firm, corporation, company, or association, or any mercantile, agricultural, or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier complaining of anything done or omitted to

be done by any common carrier subject to the provisions of this chapter in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigation of said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Title 49 U.S.C. § 15(1)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(1) Commission empowered to determine and prescribe rates, classifications, etc.

Whenever, after full hearing, upon a complaint made as provided in section 13 of this title, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, either in extension of any pending complaint or without any complaint whatever, the Commission shall be of opinion that any individual or joint rate, fare, or charge whatsoever demanded, charged, or collected by any common carrier or carriers subject to this chapter for the transportation of persons or property,

as defined in section 1 of this title, or that any individual or joint classification, regulation, or practice whatsover of such carrier or carriers subject to the provisions of this chapter, is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate, fare, or charge, or rates, fares, or charges, to be thereafter observed in such case, or the maximum or minimum, or maximum and minimum, to be charged, and what individual or joint classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the Commission finds that the same does or will exist, and shall not thereafter publish, demand, or collect any rate, fare, or charge for such transportation other than the rate, fare, or charge so prescribed, or in excess of the maximum or less than the minimum so prescribed, as the case may be, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed.

Title 49 U.S.C. § 15(7)

§ 15. Determination of rates, routes, etc.; routing of traffic; disclosures, etc.

(7) Commission to determine lawfulness of new rates; suspension; refunds.

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Com-

mission shall have, and it is given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or

charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after September 18, 1940, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

Title 49 U.S.C. § 15a(2)

§ 15a. Fair return for carriers.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are perscribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

U.S. GOVERNMENT PRINTING OFFICE: 1973

Supreme Court of the United States

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
and Intervenor-Defendant-Interveners,

Appellants,

v.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

---

BRIEF FOR WICHITA BOARD OF TRADE, et al.

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In the
Supreme Court of the United States

Nos. 72-214 and 72-433

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,
and INTERSTATE COMMERCE COMMISSION,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

On Appeal From The United States District Court For The District of Kansas

---

BRIEF FOR WICHITA BOARD OF TRADE, et al.

STATUTES INVOLVED

Section 1(5) of the Interstate Commerce Act as amended, 49 U.S.C. § 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Section 15a of the Interstate Commerce Act as amended, 49 U.S.C. § 15a, provides:

> (1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations and practices relating thereto.
>
> (2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

Section 15(7) of the Interstate Commerce Act as amended, 49 U.S.C. § 15(7), provides:

> Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would

otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increase rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

QUESTIONS PRESENTED

1. Whether the Court was correct in holding that the railroads were not relieved of their normal statutory burden of proving that the aggregate of the existing rates plus the new inspection charge would be just and reasonable because a great number and variety of rates are involved.

2. Whether the fact that the aggregate of the applicable line-haul rates and the new inspection charge would not exceed certain defunct rates originally established thirty-seven years ago by the Commission and since increased over 150 percent by general revenue need increases relieved the railroads of their burden of producing evidence to show that such aggregate charges would be just and reasonable.

3. Whether the Commission was correct in shifting the burden of proof from the respondent railroads to the shipper protestants to produce evidence of the competitive truck and barge rates so that the issue of the effect on railroad revenue of prospective traffic diversion could be resolved.

4. Whether Section 15(7) of the Interstate Commerce Act, which provides that the Commission may suspend new charges for seven months while holding hearings and reaching its decision, precludes a Court which set aside such decision from restoring the *status quo* by enjoining the charges upon remand to the Commission.

STATEMENT

Opposition By The Grain Industry To This Proposal

These Appellees consist of the principal parties and witnesses who appeared before the Commission. Appellees are named in Appendix P and their members include thousands of farmers, country grain elevators, terminal elevators, grain merchants, boards of trade and grain exchanges, national associations representing producers, grain merchants and other segments of the grain industry, and state agencies representing agricultural interests. The array of grain industries allied on the same side against the railroads proposal in this proceeding is unprecedented in litigation involving grain rates. These Appellees speak

for the grain industry throughout the western United States.*

This broad opposition to the railroads proposal was engendered by two factors: (1) the railroads have admittedly published this charge for the primary purpose of creating an economic barrier against inspection in transit which would have the effect of destroying the existing marketing system for grain; and (2) the patent unreasonableness of adding a charge for grain inspection to existing rates which admittedwly include a compensation factor** for grain inspection, but without a concomitant reduction in the rates. Up until this time, whenever the railroads removed the inspection service they only did so when accompanied by reduced rates (A. 14).

The net effect is that the railroads seek double compensation for the same service, once in the existing line-haul rates and a second time by the separate inspection charge. Conversely, where grain inspections are precluded by the barrier effect of the charge, the result is that grain would continue to move at rates which include specific compensation for the inspection, but such service would no longer be provided at those rates.

Another point urged by the protestants on behalf of the grain industry was that because of the close competition between railroads, on the one hand, and trucks and barge lines, on the other, the effect of this increase in

---

*Appellants' briefs allege that only one-third of these Appellees were parties to the Commission proceeding. A review of the parties and witnesses to the Commission proceeding shows that the thirty-eight Appellees were either parties, witnesses or members of associations which were parties to the Commission proceedings, with the exception of California Grain and Feed Association, Pacific Northwest Grain Dealers Association and Peoria Board of Trade.

** It was conceded by the railroads that when the rates at which the grain moves were established they included compensation for the cost of providing inspection (R. 232-3; 238; 258).

total charges or reduction in rail services would be to make the railroad service less competitive and to cause substantial diversion of rail traffic to the other modes.

The Commission's decision summarized some of the more important reasons why inspection in transit has been the norm in the grain trade for many years:

> There is a need for a sampling and inspection of the grain at some time during the marketing process. The grade of the particular shipment must be determined before the majority of sales can be consummated. For a number of reasons it has been convenient for grain shippers and receivers to have the grain inspected while in transit. If a variance of the grade from what was offered is shown by the inspection, the shipment can be reconsigned to more appropriate markets. Also, there is less chance of deterioration than is the case if the inspection is made earlier at the point of origin. Finally, the possibility of bias is lessened if the inspection occurs after the shipment leaves the origin elevator.* (A. 17)

Another important reason for inspection of grain in transit, overlooked in the Commission's decision, is that it provides a means of offering each car of grain to a nationwide market of buyers through the grain exchanges. Typically, a carload of grain is shipped from a small elevator in the country to a primary market (such as Chicago, Kansas City, Hutchinson, Peoria, etc.) where a sample of the grain is taken in transit and rushed to the floor of the exchange where it is sold by grade and quality to the highest bidder on an exchange where nationwide buyers are represented. Such open competition effectively pro-

* One of the principal grain companies compared the grades of cars purchased and graded at origin in 1969 with the grades of the same cars at destination and found such wide discrepancies in favor of the sellers at the origin grades that it abandoned purchases at origin grades in 1970 (Ex. 99, p. 2). The summary comparison of their origin and destination grades is in Appendix B hereto. Also significant here is the fact that only 167 of the 8,700 grain elevators in the West have the automatic samplers at origin (Exs. 50 and 60).

vides the highest price to the farmer and also enables grain companies throughout the nation to enjoy the opportunity to purchase the grain. If the inspection in transit were eliminated or subjected to the economic penalty of a special charge, as here proposed by the railroads, the result is that the grain is channeled to the few buyers which maintain terminal elevators at each primary market and the grain would then be sampled after delivery to the buyer's elevator, a practice allowed without charge under the proposed tariffs. Thus, the railroads, who have claimed that they hope that the deterrent effect of the new charge would be so great that not "one penny" would be collected thereunder and all grain would move without inspection in transit, have taken deadly aim at the grain marketing system in this country as well as at the grain merchants and grain exchanges to which this system is vital.

Whether grain is deterred by this charge from inspection in transit or whether the inspection takes place and the charge is assessed, the farmer suffers a significant loss. In the former case he loses the prospective higher bid engendered by national (as opposed to merely local) buying competition; and in the latter case the inspection charge is deducted from the proceeds paid to the farmer, thereby reducing his income.*

The Railroads' Argument For An Inspection Charge

The railroads urged that inspection in transit uses extra car days and thereby effectively contracts the size of their

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* The grain industry witnesses testified that the farmer would ultimately have to bear this charge and affidavits submitted by members of the grain trade in opposition to the issuance of a stay herein showed that has actually taken place since the charges went into effect. (App. A hereto; Ex. 91; R. 1153, 1154)

fleet and contributes to car shortages; that the cars can be inspected as well at origin or destination as in transit; and read into the amendment of the Grain Standards Act in 1968 (removing the statutory requirement for inspection of interstate grain shipments) a revolutionary change in grain marketing and an invitation to facilitate that revolution by these new charges. That amendment received the uniform support of the grain industry, including these appellees, for the reason that it removed the mandatory inspection requirement under circumstances where it served no useful purpose. Prime examples of such shipments which need not be inspected are intra-company movements (where no sales transaction is involved) and direct shipments to feedlots (where the grade and quality of the grain is not so significant).

The Commission's View Of The Grain Standards Act

Although of dubious relevance to the issues under the Interstate Commerce Act which the Commission was required to decide, reams of legislative history concerning the 1968 amendment to the Grain Standards Act were introduced into the record before the Commission, primarily by the railroads.

From all of that, the Commission concluded that improved car utilization was not the primary factor in the enactment of the 1968 amendment to the Grain Standards Act, but that it was a "consideration". (A. 16) The Commission also noted as significant the fact that prior to the amendment the requirement of inspection could have been satisfied by inspection at origin or at destination, thus recognizing that the railroads' argument that inspection in transit was somehow a creature resulting from the now-deleted provisions of the Grain Standards Act was a misconception (A. 14). The invalidity of the railroads' theory that the amendment brought an end to the era of inspection in transit is even more conclusively established by the fact

that during the year following the revision there were more inspections in transit on the western railroads than during the year preceding it (A. 10).

While the Commission thus failed to find any mandate for the elimination of inspection in transit in the Grain Standards Act, it treated the existing grain marketing system more harshly. It noted that inspection of grain in transit "provides a logical and practical way for buyers and sellers to be assured of the grade or quality of grain in a particular shipment" (A. 36); that "the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality"; but concluded ultimately that "it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad (A. 35)".

In the District Court, Appellees did not ask a review of the evidence in order to test the Commission's conclusion that it is not "essential" to the marketing of grain that it be inspected in transit because none of the issues as to the lawfulness of the railroads' proposal turns on that point. What is important is that the grain marketing structure as it exists has been built upon inspection in transit; that this is an important feature of the service available under the line-haul rates as they have existed for many years; and that the removal of inspection service from the line-haul rates and the imposition of an additional charge for such service would undisputedly have a major impact upon the grain marketing system as it exists today. All of this underscores the point that the railroads were required to establish fully the lawfulness of their proposal under the Interstate Commerce Act. The amendment of the Grain Standards Act in 1968 in no way contemplated elimination of the general practice of inspection in transit. Nor did it

authorize a waiver of the Interstate Commerce Act to create tariff provisions eliminating inspections without a showing that they conform to the statutory requirements of justness and reasonableness. The Interstate Commerce Commission was not called upon to interpret and apply the Grain Standards Act and its decision must be tested by the standards of law which it has been created to apply under the Interstate Commerce Act.

The Major Errors In The Commission's Decision

On review of the Commission's decision, the District Court set it aside for the reasons that the railroad had failed to present any evidence to meet their burden of proof that the aggregate of the existing rates plus the proposed additional charge for the inspection service would be just and reasonable when measured by a comparison with the total cost of the services involved; that the railroads were not relieved of their burden of presenting sufficient and representative evidence as to the combined rates and charges because a broad geographic area and thousands of rates were affected by the proposal; and that the mere fact that the combined rates on which the traffic moves plus the charges would not exceed the level of certain "paper" rates* prescribed by the Commission in 1934 plus all in-

* The term "paper" rates refers to rates which were originally published in tariffs years ago but at which the traffic can not or does not move today. Thus, they have a mere existence on "paper" but are not viable rates. Typically, rates become paper rates when during the passage of time it develops that they are too high to move the traffic and are supplanted by lower scales of rates and are maintained in the tariffs for special reasons. Here the Docket 17000 rates relied upon by the Commission in its decision as the standard of just and reasonable rates were described by the railroads' principal witness as mere "paper" rates today, which move little or no traffic but have been maintained in the tariffs because the Commission's 1934 order in that proceeding has never been revoked. (Ex. 1, p. 11; R. 26, 44)

tervening general increases during the past 35 years neither excuses the railroads from their burden of proof nor satisfies it.

The Court rejected the exception to the general statutory proof requirement that the Commission attempted to carve out, *i.e.*, that if the railroads failed to present proof as to the total costs and services involved because of alleged difficulty in amassing such proof, they are excused from that burden if they show merely that the aggregate would not exceed certain other rates established 35 years ago plus intervening general increases. (A. 102-105).*

Another major error in the Commission's decision also relates to the burden of proof which the railroads must meet in an investigation proceeding. Where, as here, they are engaged in intense competition with trucks and barges for the grain traffic involved, the railroads are required to prove that the increase in the total charges and the removal of a valuable service advantage from the line-haul rates would not result in such substantial diversion of traffic as to cause a revenue loss. The railroads' witnesses uniformly testified as to the keen competition with these other modes and the grain industry witnesses generally testified that the results of the railroads' proposal here would be substantial diversion from the rails. The Commission disposed of this issue by finding that "comparative costs" for movement of grain by railroad versus by truck or barge are "essential before a decision can be reached on diversion" and, finding no such evidence in the record, it resolved the diversion issue in favor of the rail-

* The Commission recognized that the generally applicable rates, on which the grain traffic actually moves, are on a lower level than the Docket 17000 prescribed rates plus intervening increases (A. 14).

roads. Since Section 15(7) provides that the burden of proof in the Commission proceeding was upon the railroads, the Commission's error inheres in its failure to so find and to conclude that in the absence of "essential" evidence the railroads had failed to prove their case. Although the District Court did not reach this issue because of its holding that the Commission failed to apply the statutory burden of proof as to the total rates and charges involved in this case, this Court is being asked to resolve this issue here, regardless of the conclusions which may be reached on the issues ruled upon by the District Court. The matter of burden of proof as to diversion of traffic in proceedings such as this is of great interest to shippers generally and the Commission's misunderstanding of the statutory requirements should be rectified even though the District Court's decision is affirmed on the grounds stated in its opinion.

Both of the main issues on the merits have in common the complete failure or refusal by the railroads to introduce evidence on such issues. Consequently, there is a complete failure of proof in the record as to two issues which the railroads had the burden of proving before the Commission in order to justify their proposal. The District Court held that the Commission had failed to properly apply the burden of proof imposed by the statute upon the railroads in this case and, in view of the utter failure of proof by the railroads in the record, enjoined or "suspended" the application of these new charges *instanter* and remanded the matter to the Commission for further proceedings consistent with its opinion.

Issues Raised By Appellants

In its Jurisdictional Statement the Commission stated that "no appeal is taken from the remand on the merits" and asked for reversal of only that part of

the District Court's opinion which suspended and made ineffective the charages.* The Department of Justice has filed a memorandum in this case which takes no issue with the District Court's decision on the merits but concurs in the Commission's position that the District Court does not have the power to enjoin or suspend the charges upon a decision setting aside a Commission order which allowed such charges to remain in effect. The railroad Appellants raised that issue and also challenged the District Court's opinion on its merits.

If Appellants' argument that, upon setting aside a Commission decision for the railroads' failure to meet their burden of proof, the District Court is impotent to protect the shipping public in appropriate cases by enjoining the new charges pending any further judicial appeal and further Commission proceedings were sustained, the result would be that the railroads could continue the disassembly and destruction of the grain marketing system and accomplish their purpose by lengthy litigation, even though they had failed to meet their statutory burden of proof and had lost their case. We believe that in a case where the railroads have not carried their burden of proof the law provides more protection for shippers than the prospect of further years of litigation and the concomitant destruction of their marketing system.

Directly pertinent here is the report recently lodged by the railroads with this Court covering the six months period April through September, 1972 which shows that

* The Commission has now filed a brief in which it not only urges the sole point raised in this appeal but also endeavors to challenge the District Court's decision on the merits. This reversal of its posture apparently runs contrary to Rule 15 of this Court which provides that only the questions set forth in the Jurisdictional Statement will be considered.

approximately one third of the inspections which would have taken place were deterred by the charges. The affidavits submitted by these Appellees in opposition to the issuance of a stay showed that while the charges are in effect the farmers must absorb 1 cent per bushel out of their selling price (which can never be restored to the farmers since they do not pay the freight charges to the railroads and would not be reimbursed in any event); that the farmers lose the price benefit of competitive bidding on the broad markets otherwise available to them; that the grain merchandisers suffered a loss of 40 percent in the volume of their business due to the deterrent effect of the inspection charge during the first year that the charge was in effect; that many of such merchandisers have been carrying on their business at a loss since the charge became effective and if the charge remains in effect much longer several of them would be forced out of business; that recently 26 of the grain inspectors employed at the Chicago market were discharged because of lack of business due to the inspection charge and that such people must seek employment in other fields; and that "the railroads, by keeping this charge in effect for a sufficiently long period of time can succeed in substantially destroying the marketing system for grain which uses inspection and has been in existence for over 40 years, regardless of whether they ultimately prevailed in this case" (Affidavit of Howard Stotler filed with Memorandum of Secretary of Agriculture in Opposition to Application for Stay of Judgment and attached hereto as Appendix A).

On its face, the proposed charge is an attempt to assess an additional charge on top of line-haul rates which concededly already include a compensation factor for that service, but without a concomitant reduction in the rates.

Car Supply

The railroads urged that their main goal was to conserve car supply and relieve partially the car short-
to conserve car supply and relieve partially the car short-
age problem by deterring the trade from inspection in transit.* The Commission, thoroughly aware of the chronic car shortage problem and the criticism and outcry attendant thereto, was evidently so bedazzled by the claim that the new charge would alleviate car shortages that it concluded to approve the proposed charge regardless of whether or not the evidence showed compliance with the statutory requirements of proof under the Interstate Commerce Act for changes in rates and charges. This is the only factor which could account here for the Commission's total abdication of its statutory function of requiring evidence to satisfy the burden of proof of the basic elements of justness and reasonableness. Yet, in its decision the Commission took great pains to state that "we have con-

* In this respect the new charge has been only a moderate success. The report filed by Appellant railroads with this Court on January 5, 1973 shows that during the most recent 6-month period reported, April through September, 1972, there were 129,982 cars inspected as compared with 189,559 during the same months of 1971, a drop of 31 percent. While this shows a substantial reduction in the number of cars inspected due to the deterrent effect of the charge, it also shows that on most cars the effect has been the performance of the same service as in the past but at higher aggregate charges. It should be noted that the claimed 3 days per inspection can only be attributed to the railroads operating practices inasmuch as the tariffs allow the shippers only a few hours for inspection, *e.g.*, less than one-half day is permitted at Chicago (Ex. 89, p. 6).

cluded the charges shown to be just and reasonable on the usual basis of review" before giving any consideration to the assertion that the charges would help the car supply.* In any event, the Commission purportedly reached its conclusion that the rates and charges are shown to be just and reasonable apart from the consideration of car supply effect and it should be reviewed on that basis.

Thus, there is no question here presented as to whether car supply considerations can relieve the railroads of their normal statutory burden of proving the justness and reasonableness of the affected rates and charges. Even if that question were present it is difficult to conceive that a policy goal could justify the approval of rates and charges which do not meet statutory requirements. The Commission's decision obviates any necessity for considering here the question of the effect of the proposed charge on car supply or whether a showing of a positive effect on car supply could negate statutory requirements.**

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* In a rather candid separate expression concurring in the result the Chairman of the Commission allowed that the collateral effect of the proposal on car supply served to "quiet the doubts held concerning the legal aspects" of the new charge.

** In the six month report filed with this court by Appellees on January 5, 1973 they claimed putative savings in car days of 212,859 days during this six month period April, 1972 through September, 1972. On an annual basis this would be the equivalent of about 1,200 additional cars per year saved, without giving any effect to the additional offsetting car days lost due to the substitution of inspections at origin or destination in lieu of in transit. The same report shows that there were 129,982 cars inspected in transit during those six months which, at the going rate of $17.00 per inspection, means $4,419,000.00 per year additional revenue to the 19 reporting railroads for performing a service already compensated by the line-haul rates.

SUMMARY OF ARGUMENT

The basic deficiencies in the Commission's decision arise out of its efforts to disregard statutory standards and to find the aggregate of the linehaul rates and the new charges just and reasonable in the absence of any evidence addressed to such standards. The Commission was misled into these errors by the railroads' vociferous claim that the new charges would discourage inspection and thereby improve the car supply. Yet, the Commission's decision purports to find that this proposal meets the normal statutory requirements, despite the conceded lack of any evidence addressed to their burden of proof to compare the total costs and revenue for the total services involved and to show that this increase in total charges will not result in diversion of traffic to their truck and barge competitors. In the face of this deliberate failure to present any evidence to meet the plainly stated requirements of Section 15(1) and 15a(2) of the Interstate Commerce Act, the District Court acted properly in exercising its ancillary equitable power to enjoin the unjustified new charges during the period of remand to the Commission.

I.

The Commission's conclusion that the statutory requirement of comparing total costs and revenue does not apply in a case where thousands of rates are affected is specious. If anything, the public interest affected by such broad rate changes is so great as to compel with even greater force the application of the statutory standard to this case. In any event, in fashioning this new "rule" the Commission has ignored its own practice over the years as well as the holding of this Court in the *New England Divisions Case*, 261 U.S. 184, 197 and subsequent cases

that the proof requirement in major cases can and should be fulfilled by showing typical evidence representative of the rate structure.

The second basis upon which the Commission here rested its effort to excuse the railroads from their burden of proof to show cost and revenue comparisons for the aggregate charges is equally specious. The asserted statutory exception is that where the proposed change in aggregate charges for the going rates at which the grain traffic moves would not exceed the level of certain "paper" rates prescribed by the Commission in 1934 plus all the intervening general percentage revenue increases they are automatically deemed just and reasonable without any proof. The latter rates have been increased 150 percent since 1934; bear little resemblance to the lower rates on which grain actually moves today; and were prescribed based upon evidence of transportation conditions which are admittedly different from those extant today. In an unbroken line of cases the Commission has argued and the courts have held that the Commission in general revenue need cases does not consider or establish the justness and reasonableness of the millions of rates affected by such nationwide percentage increases and that such decisions are therefore not judicially reviewable. *Alabama Power Company* v. *U.S.*, 316 F. Supp. 337 (D.C. 1939), *affirmed*, 400 U.S. 73 (1971); *Algoma Coal & Coke Co.* v. *U.S.*, 11 F. Supp. 487 (E.D. Va., 1935). Thus, the Commission can not rely upon its allowance of general increases as establishing a current standard of maximum reasonable rates on grain.

On the second issue, that of traffic diversion to trucks, the railroads similarly offered no proof and, again, the Commission excused them from the proof specifically required by Section 15a(2) of the Act. Contrary to Section 15(7) of the Act, which imposes the burden of proof

on the railroads, the Commission found that comparison of truck rates with the proposed aggregate charges, was "essential" to a decision on the diversion issue and, finding no evidence on this issue, unlawfully shifted the burden to the shippers. There is no warrant in the statute for relieving the railroads of their burden of proof and imposing it upon the shippers on this issue.

II.

Where, as here, the new charges are having an immediate impact upon the grain marketing system, the business volume of the grain merchants, the employment of grain inspectors, and the lower prices being paid to the farmers (none of which can be remedied by a later rate refund) the ancillary remedy of enjoining the rates during remand as afforded by the District Court is critical. The question of the survival of the inspection marketing system could well be decided by attrition during the period of remand unless this protection were afforded to the grain trade. Appellants' argument that Section 15(7) of the Act as interpreted by this Court in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), prohibits the District Court from exercising this ancillary equitable power is misconceived. Section 15(7) only purports to control the suspension of rates up until the time the Commission has entered a decision, not after, and this Court in *Arrow* expressly approved the power of the reviewing courts to enjoin the affected rates after the Commission's decision (pp. 669-70). There are a number of precedent cases upholding the power of the reviewing courts to enjoin the collection of rates approved by an invalid decision of the Commission or of some other agency. *Cantlay & Tanzola* v. *U.S.*, 115 F. Supp. 72 (S.D. Cal., 1953); *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

ARGUMENT

I.

THE RAILROADS WERE NOT RELIEVED OF THEIR BURDEN OF PROVING THAT THE AGGREGATE OF THE AFFECTED RATES PLUS THE INSPECTION CHARGE WOULD BE JUST AND REASONABLE BECAUSE A GREAT NUMBER AND VARIETY OF RATES ARE INVOLVED.

The proposed tariffs would modify the existing line-haul rates by providing that the service of inspection in transit is no longer encompassed by such rates and by establishing a separate charge of $17.00 per car to be added whenever such service is requested. Thus, the proposal would effect a change in the existing line-haul rates by deleting a part of the service embraced and establishing a new charge for the service. Section 1(5) of the Interstate Commerce Act (the Act) requires that "all charges" for transportation or in connection therewith "shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful". Section 15a(2) provides that in making such a determination:

> The Commission shall give due consideration, among other factors, . . . to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service.

In order to implement these statutory requirements, the Act provides in Section 15(7), that whenever the railroads publish tariffs stating a new rate or charge or change a

practice affecting any existing rate, the Commission is authorized to enter upon a hearing concerning the lawfulness of such affected rates and charges and at such hearing "the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, etc." is "just and reasonable".

The proceeding before the Commission was initiated under these statutory provisions. Since the railroads' proposal would effect a change in the services provided under the existing rates and would also change the total charges paid by shippers, the issues embrace not only (1) the lawfulness of the new charge *per se* but also (2) the broader question as to whether the aggregate of the existing rates plus the new charge would be just and reasonable and (3) whether the existing rates, if the service was deleted, would be just and reasonable for the reduced service. There does not appear to be any dispute among the parties but that the railroads had such a burden of proof as to the aggregate charges. The issue centers upon what type of proof is necessary under the statute in order to meet that burden.

Despite the requirement of Section 15a(2) that the "Commission shall give due consideration . . . to the need [for] a transportation service at the lowest cost consistent with the furnishing of such service and to the need of revenues sufficient . . . to provide such service", the railroads failed to present evidence showing a comparison between their costs of handling the grain traffic and the aggregate revenue from the existing line-haul rates and the inspection charge. Therefore, on the record there was no way of determining the relationship between costs and revenues at the proposed combination of rates plus the new charge. Obviously, the Commission could not give the "due consideration" required by Section 15a(2) of the

Act to whether this proposal would result in the "lowest cost consistent with . . . the need of revenues sufficient . . . to provide such service" when the railroads failed to present evidence comparing the costs and revenue. In the absence of such data, the railroads failed to present evidence discharging their burden of proof to establish that the proposed combination of rates and charges would be just and reasonable in the aggregate.

The statutory requirement of such evidence to meet the burden of proof in this type of situation has been recognized in a long line of Commission and court cases. *Secretary of Agriculture* v. *U. S.*, 347 U.S. 645, 652; *Transit Charges, Southern Territory*, 332 I.C.C. 664; *Terminal Charges at Pacific Coast Ports*, 255 I.C.C. 673 (1943); *Lighterage and Storage Regulations at New York*, 35 I.C.C. 47, 61 (1915).

The most recent case on this point is *Transit Charges, Southern Territory, supra.* In its decision here, the Commission noted the following pertinent conclusions from that case:

> * * * The reasonableness of the proposal cannot be properly determined here without reference to, and consideration of, the line-haul rates, the services furnished thereunder, and the cost thereof. Clearly, in the circumstances presented, the proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. Cf. Terminal Charges at Pacific Coast Ports, 255 I.C.C. 673 (1943); Unloading Lumber at New York Harbor, 256 I.C.C. 463 (1943); and see Secretary of Agriculture v. United States, 347 U.S. 645, 652 (1954). While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service ren-

dered, including transit, must be examined in relation to the total rates and charges assessed. Respondents have not endeavored to base their action here on any facts bearing upon the revenue-cost relationship of the complete operation. Nor have they indicated the effect of the proposal either overall or with respect to the movement of the specific commodities involved. (pp. 683-684; A. 36-37.)

The reviewing court in the *Transit Charges* case similarly concluded that the total costs and revenue covering the line-haul rate, the proposed new charge, and the total services must be compared in order to determine whether the proposal is just and reasonable in its opinion in *Cinn. N.O. & T.P.R. Co.* v. *U.S.* (unreported) (S.D. Ohio, 1970), *aff'd per curiam* 400 U.S. 932:

> The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable. Whether the examination is in terms of "what portion of the line-haul rate represented the rate for the service to be separated," or whether the search in terminology is for the answer to this question: Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for

all of the services (the aggregate of the severed and the nonsevered)—the principle is the same.

The Commission's decision in the instant case purported to distinguish the proof requirement applied in the *Transit Charges* case from that applicable here on the following grounds:

> The instant proceeding is distinguishable from the cited proceeding in two important respects. As indicated, approximately 480,000 in-transit inspections took place in 1969 at various points throughout the western district. The line-haul rates applicable on the grain to, from, and through those inspection points number in the thousands and, because of the complexities of the grain rate structure, vary to a large degree. A requirement that the reasonableness of the proposed charges cannot be determined without "reference to the line-haul rates, the services furnished thereunder, and the cost thereof," effectively precludes respondents from ever establishing a separate charge for the accessorial first stop for inspection regardless of the need for such a charge. This inability was not present in the cited proceeding and even there, on appeal, the District Court of the United States, for the Southern District of Ohio, western division, *Cincinnati, New Orleans & Texas Pacific Ry. Co.* v. *United States*, ... F. Supp. ..... (decided January 12, 1970), while sustaining the Commission on other grounds, indicated that the burden of proof required of the respondent railroads was erroneous.* (A. 37)

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* The Commission suggests in it decision (A. 37) and on brief that the court in *Transit Charges* concluded that the Commission had applied an erroneous burden of proof. However, the court did not question the rule of law as stated above or that the carriers have the burden of proof as to such issue. The court's conclusion on burden of proof was that the Commission imposed an erroneous quantum of proof by holding the carriers responsible to fulfill that burden "by clear and convincing evidence" rather than the proper burden of an

The Commission's statement here as to the thousands of rates involved that "This inability was not present in the cited proceeding . . ." demonstrates how far the Commission was stretching in an effort to support an untenable position. *Transit Charges, Southern Territory* involved rates throughout the entire Southern Territory of the United States, not only on grain and grain products but also on cotton. There is thus no substantial difference in the evidentiary problem in the two cases.*

The District Court held that this purported distinction as to the number and variety of rates affected was too specious to relieve the railroads from their statutory burden of proof:

> In effect, the Commission "excuses" the respondent railroads in the case before us from meeting the substantial proof requirement in satisfaction of its long established rule predicated upon the rail carriers' "inability" to meet that obligation here. In other words, the rule is viable and applicable where the Commission determines that the railroads are "able" to carry the burden of proof but it is not applicable in those instances where the Commission determines that the rail carriers are unable to do so. Such a departure is impermissible. *Secretary of Agriculture* v. *U.S.*, 347 U.S. 645 (1954), is dispositive of this issue. (A. 104)

(Footnote continued)
"affirmative duty to develop the evidentiary record to the point where it would be adequate to support a positive finding that the proposed schedules are lawful" *Cinn. N.O. & T.P.R. Co., supra.* Thus, the Commission's argument here that the court had nullified the Commission's conclusion as to burden of proof is irrelevant to the issues here.

* The Commission's decision and order in the *Transit Charges, Southern Territory* case merely adopted *in toto*, as its own, the examiner's statement of facts, findings, and conclusions. Subsequent to issuance of the examiner's recommended report the carriers cancelled the charge as it applied to grain and grain products. Nothing in the decision, however, turned on that fact. 332 I.C.C. 664, 665.

The District Court was clearly correct in holding that the burden of proof — a statutory burden of presenting evidence as to total costs and revenue as required by Section 15a(2) — could not be excused or relieved simply because thousands of rates were affected by the railroads' election to make simultaneous publication of these tariffs. If anything, the fact that the railroads' proposal would have such a broad effect upon so many rates and shippers makes the burden of proof requirement here even more compelling. Nor is the argument of impossibility or impracticality of proof valid. Over the years, there have been many cases before the Commission where thousands of rates on one or more commodities spanning huge geographical districts of the country were involved. Out of such cases there has evolved a practice whereby "typical evidence" representative of the mass of affected rates is developed and presented so that the whole may be judged on the basis of the representative comparisons.

The suggestion that a multiplicity of rates excuses a party from the necessity of proving its case is completely invalid. In the *New England Divisions Case*, 261 U.S. 184, a Commission order prescribing divisions between carriers in different territories was attacked on the ground that the Commission had acted unlawfully in prescribing divisions between groups of carriers without considering the carriers and their divisions individually. This argument did not impress the Court. It held that the Commission had authority to base an order on evidence typical* of the whole rate structure, pointing out that "To require specific evi-

* The principle that the Commission may make an order affecting numerous rates on the basis of evidence which it deems typical in character and ample in quantity has been followed by this Court in *Chicago & N.W.R. Co.* v. *A.T. & S.F. R. Co.*, 387 U.S. 326, 340-343 (1967), and *B.&O. R. Co.* v. *Aberdeen & R.R. Co.*, 393 U.S. 87, 92 (1968).

dence and separate adjudication, in respect to each division of each rate of each carrier, would be tantamount to denying the possibility of granting relief," (p. 197) and that it had been the practice of the Commission for many years prior to 1920 to pass upon comprehensive rate changes "on evidence deemed typical of the whole rate structure." So here, too, evidence typical of the grain rate structure could have and should have been presented.

II.

THE FACT THAT THE AGGREGATE OF THE APPLICABLE RATES AND THE NEW INSPECTION CHARGE WOULD NOT EXCEED CERTAIN DEFUNCT RATES ORIGINALLY PRESCRIBED BY THE COMMISSION 37 YEARS AGO AND SINCE INCREASED OVER 150 PERCENT BY GENERAL REVENUE INCREASES DID NOT RELIEVE THE RAILROADS OF THEIR BURDEN OF PROOF.

As a second and "more significant" ground for not requiring the railroads to fulfill their burden of proof by showing cost and revenue comparisons as to the aggregate rates and charged involved, the Commission relied upon a "distinguishing feature" assertedly not present in the *Transit Charges* case and other cases where the statutory burden of proof has been applied:

> That difference is that the line-haul rate applicable to any movement of grain within the West when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products, supra*, [i.e. Docket 17000, Part 7, decided in the year 1934.] (A. 37-38).

As the Commission's decision indicates, the grain traffic actually moves today at rates substantially lower than the level of the Docket 17000 rates plus general increases and,

therefore, the rates cited by the Commission are not viable rates. (A. 14) As attested by the railroads' principal witness, the Docket 17000 rates are merely "paper" rates which move no appreciable amount of traffic today. (Ex. 1, P. 11; R. 26, 44) While rate comparisons have sometimes been used in the past by the Commission to test the validity of particular rates, it is well settled that mere "paper" rates are of no value as rate comparisons. *State Board of Equalization of Wyo.* v. *Abilene & S. Ry. Co.*, 305 I.C.C. 497, 512 (1959); *Sugar From Gulf Coast Port Groups To Northern Points*, 234 I.C.C. 247, 268 (1939).

The fact that the proposed charges plus the going rates do not exceed the Docket 17000 level plus intervening general increases is merely the incidental result of another problem which the railroads faced in this case. During the year preceding the publication of the tariffs here involved, the railroads had attempted to establish similar inspection charges but their method of publication was such that the inspection charges would have been added to all rates in their tariff, including the defunct 17000 rates which they have been carrying forward in their tariff because the 1934 prescription order of the Commission had never been revoked. When those tariffs were suspended, the railroads elected to cancel them rather than to attempt to have the old Docket 17000 order revoked; and then circumvented that problem by publishing the tariffs here in such manner that the charges were made inapplicable to any Docket 17000 rates or in any situation where any other rate plus the inspection charge would exceed the 17000 level. Thus, the reason why the Commission can find that the proposed charges and the applicable rates combined would not exceed the 17000 rates is simply the side effect of the railroad's decision not to seek revocation of the outstanding order in Docket 17000, rather than a reflection of any general recognition that the 17000 rates are a viable maximum reasonable level today.

Directly germane here is the Commission's finding that transportation circumstances and conditions have changed substantially since 1934.* Notwithstanding the intervening changes in transportation conditions, the disuse of these "paper" rates today and the general application of the much lower rates which actually move the traffic, the absence of any evidence in this record comparing cost and revenues today, and the fact that the Docket 17000 rates have been increased more than 150 percent above the level prescribed in 1934 by intervening general increases,** the Commission concluded that:

> The Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities. (A. 38)

The Commission purported to reach that conclusion by a process of bootstrapping, whereby it relied upon two series of cases in neither of which was the justness and reasonableness of the Docket 17000 rates considered or established.

The Commission first referred to its decision in 1956 in *Grain and Grain Products*, 289 I.C.C. 261, in which the 17000 proceeding had been reopened for further consideration and possible modification. There the railroads had sought a limited reconsideration of the original order so as to remove restrictions in the earlier decision against the mandatory application of combination rates that was

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* The Commission found "that . . . [Docket 17000] rate level was fixed more than 30 years ago and conditions and circumstances relating to the railroad transportation of grain have changed in the interim." (A. 38.)

** A comparison of the Docket 17000 rates as prescribed in 1934 with the level of those rates plus all general increases up to the time of hearing herein is shown in Appendix C hereto.

deemed necessary so that the railroads could establish new reduced rates on grain. There was no issue raised in that case as to what are maximum reasonable rates. There was, accordingly, no occasion there for the Commission to consider whether the 17000 rates were a valid standard of maximum reasonableness at that time; and the Commission's finding here that it had "left standing" its 17000 order without modifying it to establish a new level of maximum reasonable rates is immaterial because the issue of whether the level of such rates was reasonable or should be changed was not there presented.

Southeastern Association of R. & Util. Commrs. v. *A., T. & S. F. Ry. Co.*, 321 I.C.C. 519, cited here by the Commission, also revolves around the question of whether the carriers should continue to assess combination rates rather than single factor rates. The complainants there were seeking single factor rates into the South in lieu of the existing system of combination rates. As the Commission there pointed out, the reasonableness of the rates in the West (including the 17000 rates) was not in issue:

> *Those factors in the combinations which apply to rail movements west of the Mississippi River and North of the Ohio River are not in issue per se,* and the complainants fear that the factors applying within the South cannot be reduced sufficiently to result in reasonable through rates. (p. 541) [emphasis supplied]

Likewise, in the third case cited in the Commission's report as one in which the grain rate structure had been "reviewed", *Grain and Grain Products,* 329 I.C.C. 824, the issue again was whether the method of making grain rates shall continue to be on the basis of the combination rates, as required by the 1934 order in Docket No. 17000, and in that case the Commission vacated such requirement. But

neither in that case nor in the other two cited cases was the appropriate maximum level of grain rates reviewed in the light of current transportation and grain industry conditions and no conclusion was entered reaffirming the validity of the old 17000 rates (long superseded by the lower rates which actually move the traffic) as the maximum reasonable level of rates on grain.

The rates on which this traffic moves far exceed the rates as prescribed in Docket 17000 in 1934. What the Commission here used as a standard of reasonable rates was a level of rates consisting of the Docket 17000 prescribed rates plus all the subsequently authorized general increases which have since increased those rates by over 150 percent. The Commission noted that in the general freight rate increase proposals made by the railroads during the past 10 years "particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities (A. 38)". The key question is whether the Commission was correct in its legal conclusion that its action in allowing general freight rate increases over the years has established a new and higher standard of maximum reasonable rates on grain consisting of the 17000 rates plus all general increases allowed since 1934.

The Commission here has badly misconceived the legal significance and effect of its actions in the so-called "Ex Parte" general increase cases which allow percentage increases in rates throughout the country. A vital link in the Commission's line of reasoning turns on whether or not the Commission's orders in general revenue increase cases constitute an adjudication of the justness and reasonableness of specific rates, such as the grain rates in the West.

Since the general increase cases affect all the rates on all commodities throughout the country and must be decided within a short period of time, there is no occasion for the Commission to consider whether the resulting rates on each commodity are at or above a maximum reasonable level. The Commission grants percentage increases in rates in general revenue proceedings based upon its consideration of the carriers' general revenue needs, grouping the carriers territorially. The railroads themselves have consistently taken the position when their general revenue increases have been attacked in court that the Commission was not setting new maximum reasonable levels of rates. In *Alabama Power Company* v. *U.S.*, 316 F.Supp. 337 (D.C. 1969), affirmed, 400 U.S. 73 (1971) the railroads argued that the Commission's decision in a general increase case, Ex Parte 259, was not judicially reviewable because the Commission does not prescribe maximum rates on any particular commodities in such a proceeding:

> In the words of the *Algoma* court, plaintiffs have obviously "misconceived the real nature and effect of the Commission proceeding". The language relied upon by plaintiffs does not change the permissive nature of the Commission's action. Thus, the increased rates are carrier made rates and are not rates established by the Commission order here challenged. *Approval of a general increase program does not constitute a determination that particular rates on particular traffic are just and reasonable.* It is only the latter type of action that is subject to court review. [Emphasis added] (Railroads' Brief in *Alabama Power, supra.*, page 25).

The three-judge court in that case held that it had no jurisdiction to review the general increase decision because the Commission prescribed no particular rates but merely held that the carriers might file the new rates without suspension, citing *Algoma Coal & Coke Co.* v. *U.S.*, 11 F.Supp. 487 (E.D. Va., 1935).

The Commission can not be held to have established maximum reasonable rates in decisions in general increase cases which are not subject to judicial review. There is no evidence in this record as to the reasonableness of these rates, only the Commission's cititation of its permissive allowance of such new rate levels in the general increase cases. If the Commission's position were sustained in the instant case, the untenable result would be that a maximum reasonable level would have been set in the general increase cases, where no judicial review of that issue was permissible, and the Commission would be applying that here as *res judicata* as a standard of reasonableness which could not be tested on its merits here by judicial review. In *National Small Shipments Traffic Conference, Inc.* v. *U.S.*, 321 F. Supp. 500 (S.D. N.Y., 1970) the court dealt with this point of whether general increase cases establish maximum reasonable levels of rates on the commodities involved and concluded:

> The situation before us, then, does not resemble the pattern in those cases in which courts have held that orders of the Commission discontinuing investigations in "general revenue proceedings" of rail carriers are not reviewable. [Citing cases] *In the general revenue cases the Commission does not approve specific rates as reasonable. Rather, it hands down permissive orders which do not purport to prescribe or decide the lawfulness of particular charges.* [Emphasis added] (pp. 505-506)

Up until this point in time, the Commission has recognized that its decisions in general increase cases only mean that the trillions of rates in their tariffs, collectively, will not produce an excessive return *in toto* when increased by the general percentages authorized. In no sense is there a finding that the rates on any particular commodity (no less all individual commodities) are not unreasonably high. For

such a finding would require specific consideration of the rates on every commodity, a task which the Commission can not undertake in the context of cases designed to meet a shortage of over-all revenue. It was thus explained in the Commission's leading investigation case, *Class Rate Investigation, 1939*, 281 I.C.C. 213 at page 281 that:

> The general authorization of percentage increases does not stand as a legislative finding that rates or rate bases, increased successively in a long series of proceedings, are just and reasonable.

Perhaps the clearest statement from the Commission as to the very limited effect of the findings made in general increase cases is found in another investigation case, *Coal from Illinois to Alton and East St. Louis*, 274 I.C.C. 637 (1949):

> Respondents' assumption, that the reasonableness of the present interstate rates is not open to question because rates found reasonable 20 years ago have taken only the general rate increases, is without foundation. In approving both of the general rate increases relied upon we said that the rates increased as permitted are not considered as prescribed rates, within the meaning of *Arizona Grocery Co.* vs. *Atchison, T. & S. F. Ry. Co.*, 284 U.S. 370. The effect of that statement is equivalent to saying that while general increases were found reasonable, such general approval does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate. (274 I.C.C. at p. 670).

Thus, the Commission's attempt here to use rates prescribed in 1934, plus more than ten intervening general increases, as a current standard of reasonableness is directly at variance with its own understanding of the limited effect of general increase cases over the years.

In the earliest leading court case on this subject, *Algoma Coal & Coke Co.* v. *U.S.*, 11 F.Supp. 487 (E.D. Va., 1935), the court reviewed the role of the Commission in general increase cases and held that the Commission was not determining "just and reasonable rates for particular traffic" (p. 493); that the Commission "*prescribed* no particular rates"; that the resulting rates are "*carrier made* rates and not *Commission* made rates" and that the "dominant consideration was the railroads' need of additional revenue" (p. 494). Similarly, in *Atlantic City Electric Company* v. *U.S.*, 306 F.Supp. 338 (S.D. N.Y., 1969) the limited scope and function of the "*ex parte*" cases was reviewed. The court cited these normal findings from the Commission's decision:

> We do not herein purport to determine whether the particular rates which result from the increases are maximum reasonable rates, nor does our order constitute a prescription of rates within the meaning of the decision in *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 U.S. 370 (332 I.C.C. 715).

The court then stressed that the real issue before the Commission was the "need of revenues" overall; that the Commission's decision "neither prescribed nor specifically authorized a particular rate on a particular commodity"; and that issues as to whether the increased rates on particular commodities are just and reasonable were not before the Commission in revenue need cases and would have to be resolved, if at all, in separate proceedings* involving such issues (pp. 341-343).

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* The two types of cases in which the issue would arise are complaint proceedings (wherein the complainant has the burden of proof) or, as in the instant case, an investigation proceeding (wherein the railroads have the burden of proof).

Even more recently, in *Electronic Industries Assn.* v. *U.S.*, 310 F.Supp. 1286 (D. Wash. D. C., 1970), the court reconfirmed the principle that the issue in the "ex parte" cases is only whether there is a general "increased revenue need" and held that the Commission does not pass upon issues as to the justness and reasonableness of the resulting rates on electrical products or any other commodities (p. 1289). It is pertinent that the plaintiff there had brought evidence before the Commission of the type which the court in *Transit Charges - Southern Territory* had held necessary to determine justness and reasonableness, *viz.*, cost and revenue comparisons on its commodity, but the Commission dismissed that and all similar evidence as irrelevant to the issue in the general revenue cases:

> A number of protestants submitted studies showing costs and revenues for the transportation of particular commodities or types of traffic. Additional revenue required to meet increased operating costs and fixed charges must be obtained from all traffic insofar as possible, whether or not specific traffic is profitable, or contributes more or less revenue, or incurs more or less costs than other traffic. Costs of specific commodity movements are not in issue. . . . The compilation, presentation, and evaluation of data in such massive proportions, as urged by protestants, would make impossible the effective prosecution of our regulatory function, and is not required by the Interstate Commerce Act. *Increased Freight Rates, 1968,* 332 I.C.C. 714, 716.

Moreover, the Commission's theory here that its consideration of rates and its allowance of increases in general revenue cases constitutes the establishment of a new just and reasonable level of rates is such that it would be in no sense limited to rates which had been originally prescribed by the Commission (such as the Docket 17000

rates) and, hence, attempts to prove too much. Its broad argument that the justness and reasonableness of particular rates is established by the Commission's authorization of a general increase on all rates could in no way be confined merely to such particular rates in the tariffs as had their original basis in Commission prescription. Thus, while the Commission found here that in general increase cases during the past 10 years "particular attention" had been given to grain rates and in several instances lesser increases authorized on grain than on other commodities, what it actually did in those cases was to consider and limit the increases on the "going" rates which move the traffic and it limited the increases on such rates (which are below the Docket 17000 rates). The logical result of that argument is that, if the rates resulting from the general increase cases thus become maximum reasonable rates, the "going" rates on grain which would be here effectively increased by the new charge are themselves maximum reasonable rates.

In the light of the foregoing judicial and Commission decisions consistently holding that the ex parte decisions simply authorize additional revenue as needed by the railroads and do not consider or decide whether the resulting rates are just and reasonable, the Commission's reliance upon its ex parte decisions as a substitute for requiring the railroads to submit evidence establishing the justness and reasonableness of these rates is reversible error.

III.

THE COMMISSION MISINTERPRETED THE RAILROADS' BURDEN OF PROOF REQUIREMENT BY IMPOSING THE BURDEN ON THE SHIPPERS ON THE ISSUE OF TRAFFIC DIVERSION TO COMPETING MODES.

The second basic deficiency in the Commission's decision is its shifting to the shippers the burden of proving whether the increased total charges would result in diverting rail traffic to competing barge and truck lines. Because the District Court set aside the Commission's decision on the grounds discussed above, it did not reach this issue. This is an important issue to the shipping community and this Court is asked to resolve it even though the District Court's decison be affirmed on the basis of the conclusions set forth in its opinion.*

Where, as here, the railroads propose to delete a particular service from the aggregate services covered by their line-haul rates and to provide a separate charge for such service, thereby increasing their total charges for the same total service, rail service becomes more costly and less attractive to the shippers. If the charge proposed is substantial and the competitive situation with other modes is admittedly intense (as here), it is likely that traffic diversion would result to other modes which could reduce the railroads' net revenue. Section 15 a (2) of the Interstate Commerce Act, therefore, specifically requires the Com-

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* In determining whether the action of the court below was or was not correct in setting aside a Commission order, this Court does so irrespective of the reasoning by which such action was induced. *Interstate Commerce Commission* v. *Ill. Cent. R.R.*, 215 U.S. 452, 471 (1910); c.f. *Assigned Car Cases*, 274 U.S. 564, 580 (1927).

mission to make a determination as to the "effect of rates on the movement of traffic by the carrier or carriers" which propose new rates and charges in determining whether they would be "just and reasonable". And Section 15 (7) of the Act imposes upon the railroads the burden of proof on all the issues as to whether a proposed change in rates and charges is just and reasonable.

The *Transit Charges* case sustained the Commission's decision squarely upon the findings and conclusions of the Commission, under Section 15 (a) (2), of potential diversion of traffic from the rails to the trucks. In the instant case, the Commission's report recognized that there is an issue as to the effect of prospective diversion on the railroads' revenue. However, after noting the dispositive findings on this issue in *Transit Charges, Southern Territory*, the Commission here attempted to distinguish it:

> One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra*, was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Similar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added. (A. 39).

By the above findings the Commission here found it "essential" that there be shown of record "comparative costs" of movement via railroad and truck or barge in order to make a decision on the diversion issue; and, since it found no evidence as to such costs, there is a failure of

proof on that issue which the Commission implicitly finds was the burden of proof of the shippers, rather than the railroads. But Section 15(7) of the Interstate Commerce Act imposes that burden upon the carriers, not upon the shippers. Upon the Commission's finding that there was no evidence as to comparative costs via rail and truck, a conclusion should have been made that the carriers failed to meet their burden of proof.

The Commission's action in removing the burden of proof on this issue from the railroads and imposing it upon the shipper protestants is directly contrary to statute. Section 15(7) of the Act places the burden of proof as to justness and reasonableness upon the carriers; and Section 15 a (2) makes this matter of the effect upon the railroads' revenues an issue which must be considered in determining justness and reasonableness. Accordingly, since the Commission has here required the shippers "to leap a burden of proof requirement not in accordance with law" *Cincinnatti, New Orleans and TP Ry. Co.* v. *U. S., supra*, its report and orders must be set aside.

It is well settled that part of the railroads' burden of proof to show that this proposal is just and reasonable is the requirement that they establish that it will result in a gain in net revenues, taking potential diversion to other modes of transport into consideration. *Ex Lake Iron Ore from Chicago to Granite City*, 123 I.C.C. 503, 504 (1927); *Fresh Sea Food from and to the South*, 210 I.C.C. 605, 613, (1935); *Games or Toys, Inflated, Classification Ratings*, 294 I.C.C. 227, 231 (1955); *Phosphate Rock from Points in Florida to Points in Virginia*, 313 I.C.C. 495, 501 (1961), sustained, *Atlantic Coast Line R. Co.* v. *United States*, 209 F. Supp. 157, 159-160 (S.D., Fla. 1962).

Immediately following the finding in the report concerning burden of proof quoted above, which erroneously as-

signed the burden to the shippers, there appears the following enigmatic finding:

> Grain will continue to be moved by railroad, even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available. (A. 39).

This is a classic ambiguous finding. Taken at face value, it would mean merely that "some grain" will continue to be moved by railroad. That would not dispose of the question of the revenue effect of this proposal. If read as meaning that all grain which presently moves via rail, and is inspected, will continue to move via rail, it is contrary to all the evidence of record. No one testified that all this grain would continue so to move.

A large number of shippers testified that the imposition of this charge would lead directly to a substantial diversion of traffic to trucks. Both transit and inspection are necessary in order for the rail service to continue to be attractive to shippers (Ex. 106). By taking away one of the key incidents of rail service, *i.e.*, the right to have an inspection in the rail car at the line-haul rate, the railroads would be taking away one of the legs which holds up the rail movement, and the result will be a substantial diversion of traffic from the rails to other modes. (Exs. 106, R. 1266; 89, R. 1152, 1233; 90, R. 1153, 1154; 91, R. 1153, 1154; 93, R. 1153, 1306; 95, R. 1153, 1155; 96, R. 1153, 1155; 99, R. 1153, 1307; 108, R. 1267; 109, R. 1268, 1269; 87, R. 1150, 1151; 121, R. 1345, 1365).

The proposed charge of approximately $17.00 (current level) per car would result in an effective increase of 1.5 cents per cwt. in the charges assessed on movements of grain. This flat charge per car would fall heavily on the short-haul gathering rates on which the whole grain moves into the primary markets, such as Chicago, Kansas City,

etc. Typically, those rates range between 11 and 20 cents per cwt., making this an increase on the gathering movements of 10 per cent (Ex. 89, App. F. and G; R. 1152, 1233). As was detailed extensively in the shippers' evidence, this short-haul traffic to the primary markets is particularly susceptible to diversion to trucking.

The close competition and the effect upon the traffic movement of the effectiveness of the inspection charge since May 4, 1971, are both shown by the following movement statistics to the Chicago market:

COMPARISON OF RAIL AND TRUCK GRAIN RECEIPTS AT CHICAGO*

	Rail (000 Bu)	Truck (000 Bu)
1957	145,293	12,599
1960	124,006	31,701
1963	149,013	51,398
1966	128,399	61,060
1969	97,955	81,510
1970	109,050	74,715
1971	72,823	79,148

The above table shows that since the charge was established in 1971, the trucks are now handling the major share of the grain to Chicago for the first time in history.

The foregoing testimony was unchallenged by the railroads. Witness after witness for the railroads actually

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* Years 1957 through 1969 are from Ex. 91; years 1970-1971 are from the Affidavit of Frank Polom filed in this Court in opposition to issuance of a stay.

detailed the severe competition which they encountered from the trucks throughout their territories, thereby corroborating the testimony of the shipper witnesses that any increase of the magnitude here proposed would result in additional diversion from the railroads and a loss of revenue. (Ex. 14, pp. 6-7, R. 229, 236; Ex. 15, p. 7, R. 237, 239; Ex. 22, pp. 3-5, R. 269; Ex. 23, p. 5, R. 269, 270; Ex. 25, p. 2, R. 270 *et al.*) The fact that the present rail rates are carefully pegged so as to be no lower than necessary to meet truck competition is admitted and further corroborates that the proposed increase in charges would create significant diversion from the rails. (R. 1829-30).

One railroad witness appeared at the rebuttal hearing to acknowledge respondents' failure to meet the diversion issue. That witness, a retired employee of the C&NW, testified solely about conditions on that one railroad and made it clear that the conditions which formed the basis for his testimony were those "prior to May, 1969" when he was an active employee of that railroad (Ex. 146, R. 1801). His testimony was confined to conditions on that railroad in the state of Iowa and his observation was that "the cross-haul transportation by truckers (not having any inspection enroute at railroad siding or otherwise) involves direct movements to feeder lots." (Ex. 146, p. 10). The implication here being drawn, apparently, was that the inspection charge would have no effect on the truck volume to points where there has been no inspection in the past, such as feedlots in Iowa. His testimony in no way fills the void by all the railroads in this record as to the diversionary effect of this proposal upon the great bulk of the whole grain rail movement which is inspected on movements to primary markets (such as Chicago).

Contrary to the suggestion in the Commission's report, there is no void in the shippers' evidence as to comparative costs of truck transportation with the costs of rail

transportation plus the inspection charge. Witness Jefferson of the Indiana Farm Bureau Co-op explained how this proposal would create substantial diversion of rail tonnage to truck movement. He submitted a map showing the competitive rail and truck gathering rates to Chicago and illustrating that the addition of this charge of about 1.5 cents per cwt. would "eliminate the economic feasibility of rail shipments" to Chicago from the entire northeastern section of Indiana. (Ex. 94, p. 3 and App. A; R. 1240-41.)

Based upon the foregoing review of the record as a whole, the Commission's finding that "grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment that are available (A. 39)", if it be interpreted as a finding that there will be no diminution of rail traffic, is not supported by substantial evidence of record, is entirely gratuitous and arbitrary, and is contrary to the extensive and substantial evidence of the shipper witnesses that there would be diversion to trucks.

Since the Commission's conclusion as to truck diversion is essential to the ultimate finding of justness and reasonableness and rests upon an erroneous interpretation of the statutory burden of proof and is also unsupported by and contrary to substantial evidence, its report and orders should be set aside for that additional reason.

IV.

SECTION 15(7) OF THE INTERSTATE COMMERCE ACT, WHICH PROVIDES THAT THE COMMISSION MAY SUSPEND NEW CHARGES FOR SEVEN MONTHS PENDING ITS DECISION, DOES NOT PRECLUDE A COURT WHICH SET ASIDE SUCH DECISION FROM ENJOINING THE CHARGES UPON REMAND TO THE COMMISSION.

Both appeals raise the question as to whether the District Court, upon setting aside the Commission's decision

for misapplying the burden of proof in a case where the railroads presented no evidence to satisfy such burden, had authority to restore the *status quo* by enjoining the further application of the charges during remand to the Commission. Their argument is based upon this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), holding that Section 15(7) of the Act conferred exclusive power upon the Commission to suspend rates for seven months pending its decision.

The narrow question before this Court in *Arrow* was whether courts have the power to suspend rates before the issuance of a decision by the Commission. This court held that they do not have such power. But neither that decision nor Section 15(7) circumscribe the power of a court to enjoin rates after a decision by the Commission. The seven month suspension power created and occupied by Section 15(7), by its terms applies only to suspensions "pending such hearing and the decision" of the Commission.

Here, the hearing had been held and the decision issued by the Commission before the District Court acted. Section 15(7) does provide that "if the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such preiod." But that in no way abridges any power to enjoin these rates on or after September 29, 1971,* since as of that date the "order" described had been entered and Section 15(7) guarantees no further continuation of such changed rates beyond that date.

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* The date of the Commission's administratively final decision and order in this case. (App. 64).

After the Commission's decision has been made and its order entered, Section 15(7) does not purport to control the suspension or non-suspension of such rates, no less to provide a passport for the continuing effectiveness of such rates during an indefinite period of further litigation. Indeed, it affirmatively confers upon the Commission authority to take any appropriate action with respect to such rates as of the time it reaches its decision and order. Section 15(7) does not purport either to confer or restrict any judicial power as of the moment the Commission's decision and order has been entered. It only allows a period of life for changed rates during the interim between the expiration of the seven months suspension and the entry of a decision and order by the Commission, regardless of whether or not the changed rates are just and reasonable.

Section 15(7) provides that after the hearing and decision the Commission shall enter any appropriate order. And Section 15(7) of the Act provides that where the charges have not been shown to be just and reasonable an order should be entered that the carriers thereafter shall not continue to publish or collect such charges. Thus, as of the time the Commission made its decision herein, the case became ripe for an order either directing the continuation of the tariffs or proscribing their further use. The continued life of the new charges then became wholly dependent upon whether or not the carriers had proved their case. The brief free ride which Section 15(7) guarantees regardless of the merits of the new rates and charges had ended. The nature of the relief at that point became dependent entirely upon whether the carriers had sustained their burden of proof.

Since the District Court held that the carriers had not sustained the statutory burden of proof in accordance with

the uniform judicial and administrative interpretation of what is required to show that rates and charges are just and reasonable, it was then appropriate for the court to enjoin or suspend the further operation of such rates. Such action by the court was consistent with the provisions of the Administrative Procedure Act which direct the reviewing court to:

> (1) Compel agency action unlawfully withheld or unreasonably delayed (5 U.S.C. § 706).

Whether the court directed the Commission to order the rates cancelled, an action unlawfully withheld by the Commission because it misapplied the burden of proof in this case, or whether it ordered the rates canceled directly upon remand to the Commission, the effect is the same and is an incidental power of the reviewing court.

While the *Arrow* decision held that the courts have no power to extend the seven-month suspension period where the Commission had not yet reached its decision and order, there is no mandate in Section 15(7) which denies the federal courts the power to protect the public by maintaining the *status quo* which existed prior to the inception of the litigation at the Commission under circumstances where the carriers failed to produce any evidence to satisfy their statutory burden of proof. The issue presented for decision was stated by this Court there as:

> The problem [is] . . . whether the application of new rates might be stayed pending decision [by the Commission] as to their lawfulness. (p. 663.)

Then, reasoning that multiple individual court actions against certain of the rates and charges involved in a new proposal pending before the Commission before decision would interfere with the "uniformity" of the "timing" of rate changes and finding "a close nexus between the

suspension power and the Commission's primary jurisdiction to determine the lawfulness and reasonableness of rates", this Court held that Section 15(7) precludes judicial injunction while the Commission has not yet reached its decision (p. 668).

In so ruling, however, this Court drew a sharp contrast between the lack of judicial power to enjoin or suspend before an administratively final decision by the Commission, on the one hand, and, on the other, the power to grant injunctive relief which it specifically recognized as vesting in the district courts upon review of a Commission decision:

> A court's disposition of an application for injunctive relief [before the Commission has issued a decision] would seem to require at least some consideration of the applicant's claim that the carriers proposed rates are unreasonable. But such consideration would create the hazard of forbidden judicial intrusion into the administrative domain. Judicial cognizance of reasonableness of rates has been limited to carefully defined statutory avenues of review. These considerations explain why courts consistently decline to suspend rates when the Commission has refused to do so, or to set aside an interim suspension order of the Commission. If an independent appraisal of the reasonableness of rates might be made for the purpose of deciding applications for injunctive relief, Congress would have failed to correct the situation so hazardous to uniformity which prompted its decision to vest the suspension power in the Commission. Moreover, such a procedure would permit a single judge to pass before final Commission action upon the question of reasonableness of a rate, which the statute expressly entrusts only to a court of three judges

reviewing the Commission's completed task.[22] (pp. 669-670).

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[22] Thus we do not reflect in any way upon decisions which have recognized a limited judicial power to preserve the court's jurisdiction or maintain the status quo by injunction pending review of an agency's action through the prescribed statutory channels. *Cf., e.g. Scripps Howard Radio* v. *F.C.C.*, 316 U.S. 4; *West India Fruit & S.S. Co.* v. *Seatrain Lines, Inc.* 170 F.2d 775; *Board of Governors* v. *Transamerica Corp.*, 184 F.2d 311. Such power has been deemed merely incidental to the courts' jurisdiction to review final agency action, and has never been recognized in derogation of such a clear Congressional purpose to oust judicial power as that manifested in the Interstate Commerce Act.

Thus, rather than presenting a "square conflict" with *Arrow*, as claimed by Appellants, the action of the court below, in reviewing the Commission's administratively final decision, setting it aside, and issuing appropriate injunctive relief, was expressly contemplated and approved in the *Arrow* case by this Court.

Appellants argue that by enjoining these charges the District Court is preempting the primary jurisdiction of the Commission. But when a court determines to grant equitable relief following review of an agency's rate order, it does not thereby decide whether or not the rates are just and reasonable. That question, as was done here, is remanded to the Commission. The District Court only decided that the statute requires evidence of justness and reasonableness of the aggregate charges, which was concededly not presented here, and resolved the equitable issue of whether such charges should continue to be charged during remand. These charges are in effect today only because the Commission failed to apply the statutory burden of proof in this case. Since the railroads failed to conform to their statutory obligation to produce

appropriate evidence to justify the new charges, it is only equitable that they should not remain in effect during the remand occasioned by their failure. It in no sense intrudes upon primary jurisdiction for the equity court to exercise this power to enjoin the charges for this interim period during which Appellants argue that the Commission itself has no power to order such relief.

Since this Court in *Arrow* relied upon legislative history in concluding that Section 15(7) vested exclusive suspension power in the Commission during the period of its hearing and initial decision, consideration of legislative history may also be helpful here. The statutes governing judicial review of orders of the Commission by three-judge courts (28 U.S.C. § 2321-2325) are the result of the Urgent Deficiencies Act of 1913, 38 Stat. 220. That Act replaced the Commerce Court with three-judge district courts as the forum for review of Commission decisions and transferred substantially the same judicial review procedures and powers as previously established for the Commerce Court in the Mann-Elkins Act of 1910. It was the Mann-Elkins Act which first gave the Commission power to suspend carrier-initiated rates under Section 15(7) of the Act.

The legislative history of the Mann-Elkins Act is enlightening on the goals which Congress sought to achieve in establishing procedures for judicial review of Commission orders in the Commerce Court and in laying rate suspension power in the hands of the Commission. In citing the reasons for the creation of the Commerce Court, Representative Mann of Illinois, principal architect of the bill in the House, said:

> . . . We are met with the proposition in this country where litigation is so prolonged that the delay in justice amounts practically in many cases to a denial of jus-

> tice. These interstate-commerce cases . . . have become strung out until they have often amounted to a denial of the right of shippers to reasonable rates within a time which would be of any value to the shippers." (45 Cong. Rec. 4573, House debates on H.R. 17536, April 12, 1910)

During the same debates, Representative Hardy of Texas spoke of the relationship between the judicial power conferred upon the Commerce Court and the suspension power conferred upon the Commission:

> . . . (T)he bill provides that, pending the appeal from the Interstate Commerce Commission (finding the proposed rate either shown or not shown to be just and reasonable) to the court, the new schedule goes into effect after one hundred and twenty days (now seven months) from the date of the order of the Commission (suspending the rate). It can only be suspended after the end of one hundred and twenty days by the final action of the Commerce Court, and perhaps the Supreme Court, affirming (or setting aside) the action of the Commission . . . (49 Cong. Rec. 5163, House debates on H.R. 17536, April 21, 1910)

In considering a proposed amendment to the bill for appeals to the Supreme Court of interlocutory orders of the Commerce Court, Representative Mann said:

> . . . The Commerce Court under this bill would proceed with this case to a final judgment, and proceed to a final judgment at an early day, instead of having, as is complained of in the country, all kinds of appeals on interlocutory orders, letting the original case remain in the Circuit Courts almost forever. We want some process by which we can finish these cases, and obtain a determination, so that the shipper who has been ruined may have his rights before, and not after, he goes into bankruptcy. (45 Cong. Rec. 5428, House debates on H.R. 17536, April 26, 1910)

This history shows that the primary purpose of the Act was to secure speedy relief for shippers from unreasonable rate proposals so that they should not languish and die during protracted litigation. The District Court's decision in this case, enjoining the effectiveness of the inspection charge pending the Commission's decision on remand, was clearly consistent with this legislative purpose and with this Court's decisions recognizing the ancillary equitable power of courts on review to fashion the relief granted to the particular exigencies of each case. *Ford Motor Co.* v. *National Labor Rel. Bd.*, 305 U.S. 364, 373-374 (1939); *Inland Steel Co.* v. *United States*, 306, U.S. 153, 156 (1939); *United States* v. *Morgan*, 307 U.S. 183, 191 (1939).

In *United States* v. *Morgan*, *supra*, the Secretary of Agriculture issued an order prescribing reduced rates for stockyard services at Kansas City under the Packers and Stockyards Act, 7 U.S.C. §181, *et seq.* Kansas City packers sought judicial review in the district court. The court temporarily enjoined the reduced rates, but required the packers to pay into court, during the duration of the injunction, the difference between the reduced rates enjoined and the higher rates collected. The court sustained the Secretary's order, but this Court reversed and remanded for procedural impropriety. *Morgan* v. *United States*, 298 U.S. 468 (1935). The later proceedings in this Court were concerned with whether or not the fund which had been accumulated in the District Court during the review proceedings should be distributed to the Kansas City packers before the Secretary reached a decision in the remanded proceedings. Significantly, however, this Court in that opinion noted that the District Court permanently enjoined enforcement of the Secretary's rate order in remanding the matter. (307 U.S., at p. 187, note 1). No appeal was taken from that action. During the course of its opinion, this Court said:

> . . . The other guiding principle is that in reviewing the action of the Secretary and in similarly reviewing the action of the Interstate Commerce Commission in conformity with the provisions of the Urgent Deficiencies Act, the district court sits as a court of equity, see *Ford Motor Co.* v. *National Labor Relations Bd.*, 305 U.S. 364, 373; *Inland Steel Co.* v. *United States*, 306 U.S. 153 . . . (*id.* at p. 191).

The district court there recognized that equity would not permit the continued collection of rates or the continued requirement to impound the difference in rates during remanded proceedings, where the agency order approving the rates had been improperly entered.

The equitable power to issue injunctive relief against new rates and charges after the Commission has reached an administratively final decision has been recognized in other cases. In *Ad Hoc Com. on Consumer Protection* v. *U.S.*, 313 F.Supp. 119, 124 (D, D.C., 1970), a three-judge District Court temporarily enjoined increased rates which had gone into effect following the expiration of the statutory suspension period where the Commission had made its investigation under section 15(7) and issued a decision approving the rates. Initially, the judge to whom application had been made for a temporary restraining order had declined to grant it on the basis of lack of jurisdiction, citing *Arrow*. On appeal, the Circuit Court of Appeals for the District of Columbia remanded the matter to the District Court to convene a three-judge Court to hear the request for injunction and held that the court's power to grant temporary relief was:

> (N)ot limited by *Arrow Transportation Co.* v. *Southern Ry. Co.*, 372 U.S. 658, on review of a final order of the Commission . . . *Arrow* concerned unwarranted judicial intrusion prior to the exercise of administrative expertise; here the Commission has investigated and ap-

> proved the tariffs in question and thus has completed its function subject to a possible motion for reconsideration under 49 USC § 17 (1963). The convening judge in exercising his discretion may consider the order of Docket No. 8486 sufficiently final for purposes of *Arrow*. (313 F.Supp., at p. 124)

To the same effect is *Cantlay & Tanzola* v. *U.S.*, 115 F. Supp. 72 (S.D. Cal., 1953). There the court similarly recognized that courts can not suspend or otherwise enjoin rates prior to a decision by the Commission and then upheld:

> the inherent equitable power (of the court), following final hearing and determination of the action, to award injunctive relief "ancillary to setting aside the order of the Commission . . . in order to carry out the purpose of Congress to make the judicial review effective." (citing *Pittsburgh G.W. Va. Ry. Co.* v. *U.S.*, 281 U.S. 479 (1930); *Inland Steel Co.* v. *U.S.*, 306 U.S. 153 (1939); and *Central Kentucky Gas Co.* v. *Railroad Co.*, 290 U.S. 264 (1933)).

Against this well-founded body of precedent, Appellants cite only *National Small Shipments Traffic Conference, Inc.* v. *U.S.*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970). There, without citing any reasons or precedent (other than *Arrow*, which it recognized as distinguishable), that court negated the judicial power to enjoin rates after a final Commission decision. But the statements there concerning the power of courts to enjoin rates were *dicta*, inasmuch as that court had only been asked to "permanently enjoin the Commission's order*" and had not been asked to enjoin the rates

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* A "permanent injunction" would be inimical to remand and would effectively terminate the entire litigation. In the instant case the court below has remanded the case to the Commission for further proceedings and, in so doing, its action is consistent with the holding in *National Small Shipments* on the issue raised there

(p. 513). Thus, the comments in *National Small Shipments* concerning lack of judicial power to enjoin rates upon setting aside a Commission decision represent an excursion into a point which was not raised for its decision and which had neither been briefed nor argued by the parties. While the distinction can also be drawn that there the carriers were not parties to that case and were beyond the court's jurisdiction, the *dictum* in *National Small Shipments* on the judicial power to enjoin rates was clearly wrong and directly contrary to the rule of law as correctly acknowledged by this Court and followed consistently in the decisions cited *supra*.

The Memorandum of the Department of Justice presents a "policy" argument in support of stripping the equity court of its injunction power which is both calloused and unrealistic. The suggestion is that since the rationale for *Arrow* and a substantial part of the justification for conferring the seven-month suspension power upon the Commission was to avoid the issuance of partial injunctions by courts throughout the country (which protected certain shippers but not others), the courts should not have the injunctive power here because it could lead to lack of uniformity. The argument is that since there is a possibility that some shippers could not be protected by the court, no shippers should be protected from the results of an invalid decision.

This ignores the fact that Congress gave jurisidiction over the Commission's decisions to the federal courts. The Commission's decisions can be attacked in whole or in part. This fully contemplates the possibility that one group of shippers or carriers could seek relief setting aside only that portion of a decision which affects them. But the "uniformity" problem was settled by giving review juris-

diction to the three-judge federal courts and providing for direct appeals to this Court. On the one hand, the Commission was given whatever responsibility exists to preserve uniformity during its seven-month-suspension period. On the other, the three-judge federal courts were given responsibility to resolve whatever problems of uniformity might arise out of their review of Commission decisions, subject to direct appeal to this Court.

It would be absurd to hold, as Justice Department argues, that a three-judge court is given the awesome power to set aside in whole or in part a Commission decision but that it does not have the incidental power to enjoin the rates approved therein during the period of remand. The railroads would be the real beneficiaries if this "uniformity" argument should prevail; and the shipping public, assertedly the beneficiaries of Justice Department's argument, would be left remediless outside the courthouse with the prospect of being forced out of business during the further litigation. The shipping public does not want the protection which Justice Department offers, i.e., "uniformity" in no prospect of injunctive relief for any shipper. The equity court is well suited to handle any problems of uniformity which might arise in cases involving review of Commission decisions.

Neither the Commission nor the railroad Appellants have presented any reasons of public interest or policy warranting an interpretation which would render the federal courts impotent to grant relief preserving the *status quo** when

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* The *status quo* is usually defined as the last peaceable status preceding the litigation. Here the litigation was initiated at the Commission at a time when the charges were not in effect. See *Sunbeam Corp.* v. *Economy Distrib. Co.*, 131 F.Supp. 791, 795 (E.D. Mich. 1955); *Gamlen Chem. Co.* v. *Gamlen*, 79 F.Supp. 622, 631 (W.D. Pa., 1948).

they set aside a decision of the Commission. Such a rule would preclude relief absolutely, regardless of the compelling basis for setting aside the Commission's decision and the drastic impact upon the shipping public. It is understandable why the railroads are motivated to take the extreme position that a Commission decision and order marks the beginning of an extended period of limbo where no authority can touch the rates during a period of further litigation, regardless of its nature or duration. Consider the situation which would result whenever a Commission order is set aside by a court if no power to enjoin or suspend the involved rates exists. If the railroads seek review of an adverse Commission decision (ordering cancelation of their new rates) and it is set aside, the new rates can then become effective with immunity. On the other hand, if the shippers seek review of an adverse Commission decision approving the new rates and it is set aside, the new rates would remain in effect. Either way, the carriers' new rates would be in effect whenever a Commission's decision is set aside. This situation would be inequitable to the shipping public. The courts must be allowed to retain the power to enjoin the rates in appropriate cases where the nature of the decision and the balancing of equities so require.

Perhaps no more graphic illustration of the absolute need for the right of the court to exercise its equitable power could be presented than that shown here. The major aim of the proposed tariffs is to create a barrier against inspections. As a result, the number of cars inspected has been reduced in amounts varying from an estimated 30 percent to 50 percent. This has meant and would continue to mean lower prices for the farmers, unemployment for the grain inspectors, business losses and imminent failure for the grain merchants dealing in inspected grain, etc., as detailed

in the affidavit of a grain industry spokesman in Appendix A hereto. In short, the continuing effectiveness of these charges is destroying the key elements of the grain marketing structure as it has existed for over 40 years. Thus, the charges which the railroads have not proved lawful under the applicable statutes have all but accomplished their goal of destroying the in-transit grain marketing system and they will complete that destruction if allowed to remain in effect upon remand. None of these injuries caused by the barrier effect of inspections not made or shipments not made would be recompensed by a refund of the unlawful inspection charges collected, the relief emphasized by Appellants.

There is a vast difference between the sufferance in *Arrow* of the few months gap between the expiration date of the seven month-suspension period and the Commission's administratively final decision, on the one hand, and, on the other, the open-ended time period which ensues after a remand to the Commission.* The most recently remanded grain case was pending before the Commission after remand for three years before the ultimate decision was rendered. *Transit Provisions on Wheat at Twin Cities, Minn.*, 341 I.C.C. 235 (remanded July 16, 1969; decided July 27, 1972). That case involved rates only via Minneapolis. It is frightening to contemplate how long the railroads might succeed in deferring a decision in the instant case which involves all points in the West.

Also to be considered here is the direct relationship between the relief available and the decision as to whether to pursue the right of judicial review. The grain trade nor-

* A period of about two years ordinarily elapses between remand and the further decision of the Commission.

mally looks from one harvest season to the next. If the relief available after an invalid Commission decision were to be effectively attainable only after two years of litigation through the courts and an additional three years before the Commission, this would have a profound effect upon the decision of whether or not to seek judicial review. In this instance, justice delayed would mean no justice at all.

The Court is requested to uphold the power of the District Court to issue the equitable relief here afforded. The *Arrow* decision has left the shippers bereft of a remedy to protect their businesses during the period between the expiration of the seven month-suspension period and the Commission's decision on the merits. If the remedial vacuum were extended to include the period of years normally ensuing after remand it would unilaterally place the shipping public in jeopardy and leave the railroads outside the law during a prolonged period. If the regulatory scheme is to be effective, it can not include a loophole of this magnitude. The incentive for shippers to challenge invalid Commission decisions would be substantially destroyed unless the equity court retains an effective remedy. If, nonetheless, this Court should hold that the District Court does not have the power directly to restrain these charges, it is requested then to hold that the court has the power under Section 6 of the Administrative Procedure Act (5 U.S.C. § 706) to direct the Commission immediately to enter an order directing the cancellation of the charges for failing to meet the burden of proof on this record, without prejudice to its decision and order after the further proceedings on remand.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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February 12, 1973

APPENDIX

APPENDIX A

AFFIDAVIT OF HOWARD STOTLER

My name is Howard Stotler and I am a partner in Stotler & Company. My address is Room 1180 Board of Trade Building, Chicago, Illinois. My company is a cash grain merchandiser. Our function is to buy and sell grain. I am also President of the Cash Grain Association of the Chicago Board of Trade. That Association is composed of members and firms of the Chicago Board of Trade which participate in the Cash Grain Market of that Board of Trade. The membership includes all the major elevator companies, commission merchants and processors in the Chicago market.

Imposition of the grain inspection charge has been a financial burden to the farmers, an impediment to the cash grain merchandisers, corn processors and terminal elevator operators and has substantially limited the ability to market grain.

Irreparable Injury to the Farmers

Since the charge has been in effect, a period of about one year, the cost of the grain inspection charge has been borne by the farmers. This is illustrated by the representative invoice attached to this affidavit as Appendix A. As entered thereon, there was a charge of $17.32 for grain inspection by the railroads on that shipment and that charge was deducted in the settlement from the amount of money due to the farmer co-op, which is owned and operated by the farmers. This charge, amounting to

about one cent per bushel, has to be absorbed by the farmer, because the merchandisers, such as ourselves, work on a small total commission of less than one cent per bushel, and there is no way the inspection charge could be absorbed by us without leaving us with an out-of-pocket loss on our transactions.

The second way in which the farmer has been hurt and would be injured irreparably by a continuation of this charge is that it limits the market for his grain. When a farmer ships a car of grain to us through the country elevator operator, this enables him to gain the benefit of the bidders available on our Board of Trade, which comprises prospective buyers throughout the country and the world. However, while the inspection charge is in effect, this means that about one cent per bushel must be deducted from the price we merchandisers can bid to the farmer, as compared with a sale of the grain to the few large local elevators at Chicago. In other words, if the grain is forced by this charge to by-pass the inspection track and thereby also by-pass the merchandisers, going only directly to the few large local elevators at Chicago, the producer loses the benefit of the broad markets now available to him. In effect, the farmer is given the Hobson's choice of either selling it through us at a price which must reflect a discount of about one cent per bushel for the inspection charge or else selling it only to the terminal elevator owners without inspection charge. If there is no inspection charge, we are in a position to continue to offer about one cent more per bushel to the farmer than if the inspection charge is imposed by the railroads.

I understand that the railroads may suggest that the charge be kept in the tariffs during an appeal to the Supreme Court with some type of refund provision if they

are unsuccessful before that Court. This would not repair the injury, however. From the farmer's standpoint, he must sell the grain on a given day and time at the best bid available, as presented to him. Thus, while the charge is in effect, our bid is one cent lower and the farmer must take, in many instances, the bids of the terminal elevators. In other words, while the charge is in effect, the farmer will not make many sales to us which could otherwise have been made at a higher price to him if the charge had not been in the tariff. There would be no refund on the many cars which would move without inspection (but which would have moved with inspection if there were no charge) during the period of the prospective court appeal; and the economic loss would be to the farmer because during this time he would be forced to accept somewhat lower bids from the terminal operators. The inspection charge, in effect, closes an avenue of commerce and serves as a barrier to the inspection and marketing system.

Injury to Merchandisers and Marketing Network

As indicated above, this affidavit is on behalf of my company, a merchandiser, as well as on behalf of our association of merchandisers. During the past year, while the inspection charge has been in effect, the volume of business for our members has been down approximately 40%, as a direct result of the inspection charge. Since we must substract the one cent per bushel inspection charge from our bids to the sellers, this charge has resulted in a deterioration of our competitive position and due to the sharp diminution of our total volume, many of our members have been continuing in this cash grain business at a loss. If the charge were restored in the tariffs for several months or more pending an appeal to the Supreme

Court, it is likely that several of our members would have to go out of this business during this time. Many of us have elected to remain in business only with the hope and expectation that the charge would be cancelled. However, the restoration of the charge would place a financial strain upon us as a group, and, I believe, a strain which individual members could not endure for another few months. The existence of this charge for the period of one year it has been in effect has had a very damaging effect upon the grain marketing system. Only last month, 26 of the men employed as grain inspectors at Chicago were discharged because of the lack of business due to the barrier in the form of a charge which the railroads have placed against inspections. These men are of modest means and must immediately seek reemployment in other fields. Also, the responsibility for inspecting cars has recently been transferred to a new organization at Chicago. However, this new organization was only prevailed upon to take over this function because the inspection charge had been cancelled by this Court. If the charge is allowed to be restored pending an appeal to the Supreme Court, it is likely that this new company would be unable to see its way clear to take over the inspection function. What I have tried to make plain here is that the mere existence of this inspection charge, whether lawful or not, for a continuing period of time has been destroying the very fabric of the marketing system whereby inspection is necessary. Any further period of time during which the charge might be in effect would lead to a more complete destruction of this basic marketing system during a period when the validity and, hence, the permanency of the inspection charge has, as yet, not been established. The railroads, by keeping this charge in effect

for a sufficiently long period of time can succeed in substantially destroying the marketing system for grain which uses inspection and has been in existence for over 40 years, regardless of whether or not they ultimately prevail in this case. We do not feel it would be just to allow the railroads to liquidate this system during the time that it takes to litigate the validity of a charge which we believe and this Court has held to be invalid. We are speaking here for small business which cannot withstand the continuation of this charge. On the other hand, the railroads have lived without an inspection charge and with the grain marketing system for over 40 years and there is no likelihood of any permanent injury to them if the charge continues to be suspended during any further appeal which they may elect to take.

I solemnly declare that I have examined the foregoing document and that the statements of fact contained therein are true.

Howard Stotler
Howard Stotler

Subscribed and sworn to before me
this 16th day of June, 1972.

Harold E. Spencer
Notary Public

My commission expires August 15, 1974

APPENDIX B

COMPARISON OF ORIGIN GRADES WITH DESTINATION GRADES ON CARS OF CORN PURCHASED ON ORIGIN GRADES BY CARGILL IN 1969

Grade	Number of cars as graded at origin	Number of cars as graded at destination
No. 1 Yellow	66	8
No. 2 Yellow	402	112
No. 3 Yellow	272	225
No. 4 Yellow	185	264
No. 5 Yellow	37	144
Sample Grade	4	144

Source: Ex. 129; R. 1418-1420.

APPENDIX C

COMPARISON OF DOCKET 17000 RATES AS ORIGINALLY PRESCRIBED WITH CURRENT LEVEL RATES

Rates to Minneapolis, Minn.

(Cents per cwt.)

From:	As Prescribed	As Incr. to Time of Hearing	Percent of Increase
Watertown, S. D.	15	38	153
Mitchell, S. D.	19	47	147
Mankato, Minn.	10	25	150
Worthington, Minn.	15	37	147
Algona, Iowa	14	37	164
Cedar Rapids, Iowa	16.5	40	142
Carroll, Iowa	17	42	147

Source: Exhibit 14, Schedule 4.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.,

Appellants,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

No. 72-433

INTERSTATE COMMERCE COMMISSION,

Appellant,

vs.

THE WICHITA BOARD OF TRADE, et al.,

Appellees.

Appeals From The United States District Court For The District of Kansas

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REPLY BRIEF FOR THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, et al.

INTRODUCTION

At the outset, before dealing with the principal arguments advanced by the appellees, it is appropriate to note: (A) the nature of the case and the appellees' interests; and (B) the appellees' tacit acknowledgment that the District Court's rationale cannot support its judgment and the appellees' effort to have this Court affirm on other grounds.

A. The Nature of This Case and the Appellees' Interests

Unlike the usual rate case, this case involves charges which the railroads hoped they would never have to collect (A. 19, 70). The purpose behind the charges is, not to obtain additional revenue from the charges, but instead to discourage in-transit inspections, encourage other sampling methods (particularly the use of origin samplers), and thereby increase car utilization. Just this past month, this Court again recognized the crucial nature of the Nation's car supply problem:

> "This case arises from the factual background of a chronic freight car shortage on the Nation's railroads which we described in *United States* v. *Allegheny-Ludlum Steel Corp., supra.* Judge Simpson, writing for the District Court in this case, noted that "[f]or a number of years portions of the nation have been plagued with seasonal shortages of freight cars in which to ship goods." 322 F. Supp. 725, 726 (MD Fla. 1971). Judge Friendly, writing for a three-judge District Court in the Eastern District of New York in the related case of *Long Island R. Co.* v. *United States,* 318 F. Supp. 490, 491 (EDNY 1970), described the Commission's order as "the latest chapter in a long history of freight car shortages in certain regions and seasons and of attempts to ease them."

United States v. *Florida East Coast Railway Co.*, 41 Law Week 4247, 4249 (January 22, 1973).

That the charges are having the contemplated effect is demonstrated by subsequent reports to the Commission. These reports (filed with the Clerk of the Court) show that the proportion of grain shipments inspected in-transit before the charges became effective was ***nearly 2½ times higher*** than the proportion inspected in-transit after the charges became effective. Stated otherwise, the propor-

tion was reduced *almost 60%*. The proportion continues to dwindle. Thus, in April 1972, *only 21.5%* of grain shipments were inspected in transit.[1] (See our main brief, pp. 13, 28) Further reductions—with corresponding improvement in car utilization—may be expected as the charges continue in force.

It is precisely this reduction in in-transit inspections which the grain exchange appellees so vigorously oppose. Their concern is not so much that shippers will *pay* the charge for in-transit inspection but rather that the shippers will *avoid* the charge by the use of origin samplers (or destination sampling or the avoidance of sampling altogether), with the result that the grain exchanges and their commission merchant members will lose the "captive market" benefits (including both sale commissions and inspection fees) they enjoy on grain shipped to their locations for in-transit inspection. As the Commission found (A. 55, 18), "[b]ecause of the economic impact of the charges, the approval given herein should accelerate the use of origin samplers," and ". . . this method of inspection does not

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[1]The grain exchange appellees spuriously claim there was only "a drop of 31%" (Wichita Br. 15, footnote) and "approximately one-third" (id. at 14). They reach this conclusion by comparing April-September 1972 with April-September 1971. But the charges (which became effective on May 4, 1971) *were in effect during almost all of the April-September 1971 period.* Thus, appellees are comparing two periods when the charges were in effect. The appellees' comparison serves only to demonstrate the *continuing decline* of in-transit inspections *after* the charges became effective, and wholly fails to reflect the dramatic impact of making the charges effective. (Furthermore, even as between the two periods compared by appellees, the decline would have been even greater if it were not for the fact that the charges were inoperative from June 8, 1972 to July 7, 1972 by reason of the District Court's suspension order.)

adversely affect the grain marketing process."[2] Through the use of such samplers, any shipping point can become an inspection point, thereby giving the shipper the benefits of true nationwide competition for his grain instead of being limited to the prices available at just one market or only a few markets.

On the other hand, unlike the grain exchange appellees, appellee Secretary of Agriculture (USDA Br. 4; A. 30) does not oppose the imposition of a separate charge but instead seeks adjustment of the line-haul rates to reflect the elimination of in-transit inspections. Of course, to the extent that in-transit inspections are eliminated, neither producers nor shippers are subject to the railroad charge for such inspections.

B. The Appellees' Shift of Position and Effort to Obtain Affirmance on Different Grounds.

Although sustaining the Commission's principal findings (A. 101-102), which it then chose to disregard, the District Court based its decision on one ground and only one ground —the Commission's alleged departure from its prior decisions by adopting "an evidentiary rule which is discriminatory per se. . . ." (A. 105).[3] This rationale was based

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[2] The Commission also found that "it is not essential to the marketing process that this sampling and grading take place while the grain is in transit on the railroad" (A. 35). The extravagant statements to the contrary by the grain exchange appellees (e.g., Wichita Br. 6-7, 14) are utterly without support in the Commission's findings, and are also precluded by appellees' admitted (id. at 9) failure to seek judicial review of the evidence supporting these findings.

[3] Throughout their brief, the grain exchange appellees blandly assert again and again that the District Court based its decision on the ground that the carriers had failed to meet the statutory burden of proof imposed by § 15(7). An examination of the opinion be-

entirely on a Commission *dictum* stated in the course of setting forth an expressly *secondary* reason for distinguishing an earlier Commission decision. See our main brief, pp. 31-32.

In this Court, although they continue to attack the *dictum* (USDA Br. 13-14; Wichita Br. 20, 25-26), the appellees seek to have this Court review the record *de novo* and affirm on wholly different grounds.

The appellees now acknowledge—as they must—that the Commission did indeed consider and approve the reasonableness of the *combination* of the proposed charges and the line-haul rates (e.g., Wichita Br. 17). But the appellees complain about the *evidence* which the Commission relied upon to make that finding. The grain exchange appellees (Wichita Br. 20-27) now claim—for the first time in this proceeding—that § 15a(2) requires evidence of actual cost as a *sine qua non* of any Commission determination of the reasonableness of rates. And it is argued in both briefs of appellees (Wichita Br. 27-37; USDA Br. 15-20) that the Commission erred in accepting, on the facts of this case, the currently authorized maximum rates as the upper level of the "zone of reasonableness." The grain exchange appellees (Wichita Br. 38-44) also take issue with the Commission findings concerning possible diversion of grain shipments to trucks and barges.

Examination of the District Court's opinion (A. 100-106) readily demonstrates that the Court did not pass on any of these additional contentions now pressed by the appellees. Although it is not the Court's general practice "to review an administrative record in the first instance," *United*

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low demonstrates the complete lack of substance in this attempted reconstruction of the District Court's holding. The appellees' tactic, however, further demonstrates their unwillingness to defend the actual rationale of the District Court.

States v. *Great Northern R. Co.*, 343 U.S. 562, 578 (1952); *Seaboard Air Line R. Co.* v. *United States*, 382 U.S. 154, 157 (1965), the Court has on occasion reviewed issues *de novo*. E.g., *Chicago & N. W. Ry. Co.* v. *A. T. & S. F. Ry. Co.*, 387 U.S. 326, 356 (1967). In any event, appellees' shift of position constitutes tacit recognition that the District Court's rationale cannot support its judgment, and appellees' additional contentions (discussed *infra*, pp. 9-19) are clearly without merit.

I. THE COMMISSION'S RULING WAS IN FULL ACCORD WITH THE "LONG ESTABLISHED RULE" AND PATENTLY DID NOT "DEPART" FROM ANY "NORM."

Apparently on the theory that sufficient repetition of an untruth will make it true, the appellees persist in imputing to the Commission some "long established rule" from which it allegedly deviated here.

Thus, USDA baldly states again and again, in varying verbal combinations, that,

> "[w]here the railroads seek to establish a separate charge for a service theretofore encompassed in the line-haul, the Commission has for over fifty years required them to first demonstrate that the line-haul rate is insufficient to compensate them for the total transportation, including the service to be segregated."

(USDA Br. 11-12; see also USDA Br. 5, 9, 16, 23, and Wichita Br. 10, 22-23.) But significantly, *before* citing any authority for the quoted proposition, which is completely unsupportable, USDA (p. 12) retreats and interjects the following—and substantially different—restatement of the "long established rule":

> "Stated conversely, it is the carriers' burden under section 15(7) of the Interstate Commerce Act, 49 U.S.C. § 15(7), to demonstrate that not only the sepa-

> rate charge but also the total transportation charges resulting from its addition to the line-haul rates are just and reasonable."

(See also USDA Br. 6-7.) The decisions then cited by USDA (and cited by Wichita Br. 22-23) do indeed support this restatement of the "long established rule." However, *the Commission's decision in this case is in full accord with this restatement of the "rule" and with the cited cases,* as shown in our main brief (pp. 38-41).

There is, in short, no "long established rule" inflexibly requiring detailed cost evidence regardless of the circumstances, particularly where as here the service is optional in character and not an essential part of the line-haul transportation (A. 17-18). The "rule" instead is that the Commission must consider the reasonableness of the combination of the proposed charges and the line-haul rates, and *clearly that is what the Commission did here.* Accordingly, the basic premise of the decision below and appellees' briefs is simply unfounded.

The grain exchange appellees (Wichita Br. 20-27) go even further than USDA and argue that § 15a(2),[4] merely because it refers to "the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service" among the factors to be given "due consideration," makes a cost analysis indispensable in every rate proceeding re-

[4] Section 15a(2), 49 U.S.C. § 15a(2), provides: "In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

gardless of the circumstances. To begin with, this newly conceived statutory argument is barred since no such contention was made in the Commission proceeding. See, e.g., *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952): ". . . orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has opportunity for correction in order to raise issues reviewable by the courts. . . ."

In any event, the contention is baseless. It is well-established that the Commission may evaluate the reasonableness of a proposed rate by comparing it with other existing rates.[5] See, e.g., *Chamber of Commerce of Fargo, N.D.* v. *United States*, 276 F. Supp. 301, 307 (D.N.D. 1967); *Northwestern Steel & Wire Co.* v. *Pennsylvania R. Co.*, 305 I.C.C. 462, 464 (1958). As the Commission pointed out in *Seaboard Air Line Co.* v. *Southern Ry.*, 329 I.C.C. 17, 27-28 (1966):

> "[C]ost data are not the only bases for a determination of the reasonableness of the assailed rates. While it is true that in absence of other probative evidence cost data may be the crucial factor, our conclusion here as to the reasonableness of the assailed rates is based on broader criteria . . . . The words "just and reasonable" are not fixed, unalterable, mathematical terms. The determination of what is a reasonable rate, measured solely by cost data, would seriously limit the exercise of a flexible judgment."

Furthermore, the "due consideration" required by § 15a(2) neither compels the introduction of evidence on each factor mentioned nor dictates the manner in which the Commis-

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[5] Even the grain exchange appellees (Wichita Br. 28) acknowledge that ". . . rate comparisons have sometimes been used in the past by the Commission to test the validity of particular rates. . . ."

sion shall implement the statute. *United States* v. *Interstate Commerce Commission,* 88 F.2d 780, 783 (D.C.Cir. 1937); *Chicago B. & Q. Ry. Co.* v. *United States,* 60 F. Supp. 580, 585 (E.D. Ky. 1945).

II. APPELLEES' ATTACK ON THE COMMISSION'S USE OF THE CURRENT MAXIMA AS A YARDSTICK IS WITHOUT MERIT.

As we have shown, and as the Commission opinions make clear, the Commission did indeed consider and uphold the reasonableness of the aggregate charges. In doing so, the Commission found (A. 38, 56) that "in Docket No. 17000, Part 7, proceedings, a maximum reasonable level of rates on grain in the West was established"; that "[t]here is possibly no segment of this country's railroad freight rate structure that has been reviewed more frequently than the one that has application to the movement of grain and grain products"; that "in practically every general freight rate increase proposal made by the railroads in the past 10 years particular attention has been given to the level of the grain rates and, in several instances, the increases in rates on grain and grain products were less than those authorized for the movement of other commodities"; that "[t]he Docket No. 17000, Part 7, prescribed rates, as increased through the subsequently authorized general increases, are a currently effective maximum rate level for the movement of these commodities"; and that the proposed inspection charges when added to the line-haul rates do not exceed this maximum level.

Although the District Court did not pass on the issue, the appellees attack the Commission's use of the current maxima as a yardstick of reasonableness and ask this Court to review the matter *de novo* and affirm on that ground.

Appellees argue at length that these maxima exceed the rates which move most grain traffic and which are depressed

because of competitive pressures (A. 20). But it certainly does not follow that such competitive pressures (although they may produce bargain rates for shippers) invalidate applicable maxima. Likewise, the availability of an alternative lower rate does not, as appellees seem to suggest (USDA Br. 21-22; Wichita Br. 27-29), convert *that* rate into the applicable maximum. "The Commission has consistently held that depressed rates are not a proper standard for determining the reasonableness of other rates," *Fargo* v. *Chicago, M., St. P. & P. Ry. Co.*, 329 I.C.C. 650, 654 (1966), and "that rates depressed to meet competition do not afford an acceptable standard with which to measure the maximum reasonableness of rates." *Atlantic Creosoting Co., Inc.* v. *Southern Ry. Co.*, 323 I.C.C. 533, 538 (1964). See also, e.g., *R. M. Holingshead Corp.* v. *A & S. R. Co.*, 319 I.C.C. 86, 89 (1963); *Whatcom County Traffic and Rates Bureau* v. *Chicago, M., St. P. & P. Ry. Co.*, 287 I.C.C. 442, 443 (1952).

As this Court has pointed out: "A zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself." *United States* v. *Chicago, M., St. P. & P. Ry. Co.*, 294 U.S. 499, 506 (1935). "Within that zone the Commission lacks power to grant relief." *Georgia* v. *Pennsylvania Railroad Co.*, 324 U.S. 439, 461 (1945). See also *Texas & Pac. Ry. Co.* v. *United States*, 289 U.S. 627, 635-637 (1933); *New York Central R. Co.* v. *United States*, 99 F. Supp. 394, 398-399 (D.Mass. 1951); *Fargo* v. *Chicago, M., St. P. & P. Ry. Co.*, 329 I.C.C. 650, 654 (1966).

Under all the circumstances, particularly its intimate familiarity with the grain rate structure, the Commission was well justified in exercising its discretion to use the adjusted Docket 17000 rates as a yardstick of the upper level of the applicable "zone of reasonableness."

This case is but the latest chapter in a long history of Commission experience in this area. The Commission has over the years conducted an on-going review of the grain rate structure, has repeatedly considered the reasonableness of grain rates in general increase cases, and has *previously applied the same yardstick of reasonableness.*

For example, in *Increased Freight Rates, 1967,* 332 I.C.C. 280, 300 (1968), the Commission stated that "[w]e have not, however, been referred to any rates which exceed the level prescribed in *Grain and Grain Products,* 205 I.C.C. 301, and subsequent reports, as increased in prior general revenue proceedings" and ". . . the modest increase cannot be found to result in rates which exceed a maximum reasonable level . . . ."

Similarly, in a case relied upon by the District Court (A. 103), *Grand Forks Chamber of Commerce* v. *Great Northern Railway,* 321 I.C.C. 356, 359 (1963), the Commission approved a separate charge for in-transit inspections and specifically noted that "[t]he total charges under the group 3 rates, including the assailed charge [for in-transit inspection], are generally less than those under the group 1 rates . . . ."—i.e., the adjusted Docket 17000 rates. And just this past year, in *Public Service Commission* v. *Great Northern Railway Company,* 340 I.C.C. 739 (1972), the Commission sustained the reasonableness of rates on barley which were at the level of Docket 17000 rates adjusted by subsequent general increases. The Commission (p. 750) held that the rates did not exceed a maximum reasonable level and that it was unnecessary to consider the cost evidence of record.

See also, e.g., *Chicago and North Western Railway Co.* v. *Chicago, B. & Q. R. Co.,* 382 U.S. 422 (1966), affirming *Chicago, B. & Q. R. Co.* v. *United States,* 242 F. Supp. 414 (1965), holding that the Docket 17000 prescriptions could not be vacated without reopening of a rule-making proceeding.

As those cases illustrate, far from being meaningless "paper rates," the adjusted Docket 17000 rates have been of continuing importance and vitality. In any event, it is for the Commission—not the Courts—to determine whether particular rates constitute a currently effective maximum rate level, and the Commission specifically made that finding here (A. 38).

The grain exchange appellees are in a particularly poor position to object to the Commission's reliance on the adjusted Docket 17000 rates. In an earlier related case, filed after the Division 2 decision but before the tariffs became effective, essentially the same group of appellees sought to enjoin the carriers from putting the tariffs into effect on the ground (*inter alia*) that "[the] subject tariffs would also result in *charges which exceed those which these railroads are required to observe as a maximum under the Commission's outstanding orders in its Docket 17000, Part VII.*"[6] (Italics added.)

Despite their own reliance on the adjusted Docket 17000 rates, the appellees contend that the Commission's reference to those rates was improper because the Commission's orders in general increase proceedings (unlike the original Docket 17000 orders) do not "prescribe" rates. But while the validity of individual rates may not be adjudicated in a general increase proceeding, the Commission does determine the reasonableness of the overall level of rates approved by it and, as noted, has given particularized attention to grain rate levels. Appellees' argument necessarily assumes that the Commission, in selecting a yard-

[6] Complaint in *Board of Trade of Kansas City, Missouri, et al* v. *The Atchison, Topeka and Santa Fe Railway Company, et al.*, No. 19321-4 (W.D. Mo.), filed on April 23, 1971. The District Court denied the requested preliminary injunction, and the action was then dismissed by agreement of the parties.

stick to measure reasonableness, is barred from reliance on currently applicable maxima unless those maxima have been "prescribed." We are unaware of any basis for such an artificial restriction on the Commission's exercise of its discretion.

Moreover, contrary to the implication of the appellees' argument, the Commission's order in this case did not "prescribe" or definitively adjudicate the line-haul rates. Instead, they ". . . stand only as carrier-made rates which, under the Commission's decisions, leaves them open to possible recovery of reparations." *Interstate Commerce Commission* v. *Inland Waterways Corp.*, 319 U.S. 671, 687 (1943). Such rates may also be challenged through a complaint proceeding under § 13(1) of the Act, 49 U.S.C. § 13(1), or by a request that a lower maximum level be established under § 15(1), 49 U.S.C. § 15(1).[7]

In view of these alternative remedies which will still be open to the appellees, and in light of the Commission's history of particularized attention to grain rate levels, it was well within the Commission's broad discretion in responding "to the dynamic character of transportation problems" (*Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942)) to use the "currently effective maximum rate level for the movement of these commodities" as a yardstick to measure the reasonableness of the aggregate charges. Particularly is this so in view of the special func-

[7] USDA (Br. 20) also objects to the use of current maxima as a yardstick on the ground that as originally prescribed the Docket 17000 rates encompassed in-transit inspection privileges without additional charge and that therefore the adjusted Docket 17000 rates do not constitute an appropriate yardstick for a shipper who elects to forego in-transit inspection. USDA, however, overlooks the facts (1) that the line-haul rate charged to such a shipper will still be in the currently applicable "zone of reasonableness" since that rate cannot exceed the adjusted Docket 17000 rates; (2) that such a

tion and need for dispatch in § 15(7) proceedings. See *Inland Waterways, supra,* 319 U.S. at 689-690.

In the circumstances, it is nothing but sophistic sloganeering for appellees to assert (as they do repeatedly) that a separate inspection charge results in "a double charge for a single service" and that "those shippers who no longer take advantage of in-transit inspection . . . are still paying for a service which they no longer receive . . . ." (USDA Br. 11, 20; see also USDA Br. 10, 21, 22, and Wichita Br. 5). Such assertions are necessarily based on an assumption that all existing rates are "frozen" by law and that a carrier is somehow barred from making any rate adjustment *even though the adjusted rate does not exceed the upper level of the zone of reasonableness.* This, of course, is plainly not the law, as shown *supra,* pp. 9-10.

The basic issue before the Commission was whether the aggregate charges exceed reasonable maxima and whether the separate charge for the inspection service is itself reasonable. The Commission resolved both rate issues in favor of the validity of the rates "on the usual basis of review" (A. 54), and additionally considered the impact of such rates on the national car supply shortage (A. 54-55). Particularly in the rate-making area, "[t]he judicial function is exhausted when there is found to be a rational basis for the conclusions approved by the administrative body."

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shipper still retains his remedies under the Act to redress any possible inequity in his individual situation; and, perhaps most important, (3) that the original Docket 17000 orders *permitted* but did not *require* the railroads to grant in-transit inspection privileges without a separate charge. The Commission stated: "Under present tariffs, inspection is left to the discretion of the carriers. . . ." *Grain and Grain Products within the Western District and for Export,* 205 I.C.C. 301, 349 (1934). Thus, contrary to appellees' contention, tariffs *not* providing for in-transit inspection would have been equally subject to the prescribed maxima.

Mississippi Valley Barge Line v. *United States*, 292 U.S. 282, 286-287 (1934). See also *Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942). In the instant case, the Commission's findings (sustained by the District Court, A. 101-102, but otherwise largely ignored by it) set forth not only a "rational basis" for the Commission's conclusions, in full accord with established principles, but also a compelling national need for the action taken by the Commission.

III. THE COMMISSION PROPERLY CONSIDERED "THE EFFECT OF RATES ON THE MOVEMENT OF TRAFFIC" UNDER SECTION 15a(2).

The grain exchange appellees also ask this Court to review *de novo* their argument that the Commission violated § 15a(2) of the Interstate Commerce Act[8] by allegedly "shifting to the shippers the burden of proving whether the increased total charges would result in diverting rail traffic to competing barge and truck lines" (Wichita Br. 38). The appellees further contend that the Commission's findings on the diversion issue are unsupported by substantial evidence and, remarkably, ask this Court to examine the administrative record *de novo* for that purpose (Wichita Br. 40-44). Both these contentions (neither of which was passed on by the District Court or even mentioned in the opinion below) are patently without merit.

Section 15a(2) requires only that the Commission give "due consideration, among other factors . . ." to a series of specified factors, including "the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed." The weight to be given to this factor, and other § 15a(2) factors such as the public need for "adequate and efficient railway transportation service,"

[8] The statute is set forth at footnote 4, p. 7, *supra*.

is left to the discretion and judgment of the Commission. *United States* v. *Interstate Commerce Commission*, 88 F.2d 780, 783 (D.C.Cir. 1937); see also *Chicago B. & Q. R. Co.* v. *United States*, 60 F. Supp. 580, 585 (E.D. Ky. 1945).

In this case, the Commission did give careful consideration to the factors listed in § 15a(2), all of which are closely interrelated in this proceeding. The primary "effect of rates on the movement of traffic" is analyzed by the Commission in terms of the railroad car supply problem (A. 54-56). The Commission concluded that the inspection charges would result in a significant improvement in car utilization (A. 55, 56). The Commission also pointed out that "[a]nother matter not to be ignored is the loss of revenue caused by the reduced car supply due to grain inspections" (A. 55)—a loss estimated "at more than $10 million annually" (A. 55) as shown in an appendix to the Commission's report (A. 57).

It is difficult to imagine any more salutary "effect of rates upon the movement of traffic" than a significant increase in availability of freight cars for handling of grain traffic, particularly in periods of peak demand as at the present time. In addition, the railroads derive revenue benefits from increased utilization of their equipment.

However, the appellees (Wichita Br. 39) view the § 15a(2) issue more narrowly as solely one concerning possible diversion of traffic to trucks and barges. With respect to such diversion, which of course is but one aspect of "the effect of rates upon the movement of traffic," the Commission in this case stated (A. 39):

> "One of the grounds relied upon by the division in *Transit Charges, Southern Territory, supra,* was that the proposed increase in charges might well result in substantial diversion of the considered traffic with a diminution, rather than an increase, in revenues. Simi-

> lar conclusions are not warranted here. Comparative costs to the shipper of the movement of grain by railroad versus the movement by truck or barge is essential before a decision can be reached on diversion, and there is no showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added. Grain will continue to be moved by railroad even if it becomes necessary to pay the proposed charge because of the advantages, such as transit and reconsignment, that are available."

Although the appellees' statutory argument is by no means clear, apparently they contend that the Commission's reference in this excerpt to the lack of a "showing here which relates the cost of truck or barge transportation to the cost of rail transportation with the inspection charge added" demonstrates a shifting of the carriers' § 15(7) burden to the shippers (Wichita Br. 39, 40). It unquestionably does nothing of the kind.

Section 15(7) provides that "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." But, contrary to the premise of appellees' argument, it has never been held that this provision requires the carrier to prove whatever *defenses* are asserted by complaining parties, to cure the deficiencies in proof offered by complaining parties, or to adduce exhaustive evidence on every conceivable question that might bear on the ultimate issue of reasonableness. Such proceedings, as this case shows, are adversary in character; and the mere fact that protesting shippers fail to sustain their objections, as here, cannot be converted *ipso facto* into a shifting of the burden of proof. Indeed, if there were any substance to appellees' extraordinary argument, it would mean that carriers would be responsible for shippers' evidentiary deficiencies on *any* of the myriad factors referred to in § 15a(2).

In the decision distinguished by the Commission (A. 39) and relied upon by the appellees (Wichita Br. 39, 40), *Transit Charges, Southern Territory* 332 I.C.C. 664, 684 (1968), the Commission laid down the rule as to the type of evidence required to establish that diversion will occur:

> "The proposal, if approved, may well cause a substantial diversion of traffic to competing modes, especially exempt motor carriage. The record indicates that this loss of traffic, at least insofar as certain cotton shippers are concerned, is more than a mere empty threat, *but is rather backed by careful analyses of shippers' costs.*" (Italics added.)

This evidence—"careful analyses of shippers' costs"—was presented by the *shippers* in *Transit Charges* (p. 671) and found persuasive by the Commission in that case. But in this case, as the Commission found, the shippers made "no showing" of that nature (A. 39). While the carriers bear the ultimate burden of proving the reasonableness of the rates, the burden of going forward with "careful analyses of shippers' costs" on the diversion issue—after the carriers have first established that the inspection charges will have a beneficial effect on their traffic—obviously rested with the protesting shippers since analyses of their own modal-comparative costs are peculiarly within their own capacity and knowledge and since they will be the ones who make the decision whether to divert traffic. Cf. *Interstate Commerce Commission* v. *New York, N. H. and H. R. Co.*, 372 U.S. 744, 760 (1963).[9] Appellees' failure to present such proof can hardly be blamed on the carriers.

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[9] In that case, relating to a parallel provision in § 15a(3), this Court rejected a similar burden-of-proof argument and held: "... we agree with the court below that if a carrier shows a proposed rate to be just and reasonable from the standpoint of its own revenue requirements, it is for a protesting carrier who relies on a claim of inherent cost advantage to bear the burden of persuading the Commission of the existence of that advantage." (372 U.S. at 760 n. 12.)

In sum, the charges were shown to have a beneficial effect upon the movement of traffic, and the Commission gave due consideration to the standards enumerated in § 15a(2).[10]

IV. APPELLEES WHOLLY FAIL TO JUSTIFY THE DISTRICT COURT'S ORDER SUSPENDING THE CHARGES.

After directing a remand of the case to the Commission, the District Court *sua sponte* ordered that the inspection charges (which had been in effect for over a year and had previously been suspended by the Commission for the maximum seven-month period) "are suspended and shall be ineffective until and unless otherwise ordered by this Court" (A. 106).

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[10] The appellees' claim (Wichita Br. 44) that the Commission's diversion finding is unsupported by substantial evidence can only be regarded as frivolous. The appellees (Wichita Br. 43-44) cite the testimony of a single witness with respect to the comparative costs of a single shipper from Indiana to Chicago. This testimony was not only substantially undercut on cross-examination, but also could hardly be found to be representative of the entire Western District. The appellees (Wichita Br. 41) also assert that a large number of shippers testified that the charges would result in diversion of traffic to trucks. The testimony listed contains general allegations of diversion and no detailed comparison of rail and truck or water costs. General allegations of diversion are so often made in rate proceedings that, as the Commission observed in *Ex Parte 259, Increased Freight Rates, 1968*, 332 I.C.C. 714, 716 (1969): "Predictions of this nature are always diametrically opposed in rate increase cases and must be treated as having limited probative value."

On the other hand, the railroads showed that elimination of in-transit inspections would in no sense place the railroads at a service disadvantage compared with other modes. Highway and water carriers have been able to avoid the kind of delays to their equipment the railroads have experienced as a result of tying up equipment enroute for purposes of inspection. In addition, as the Commission found (A. 39), rail carriers offer other service advantages,

The District Court took this action

(1) without any request by the appellees to grant such relief[11],

(2) without any discussion of its authority to do so,

(3) without any finding of irreparable injury, and

(4) without any other findings to support issuance of an injunction (Rule 65(d), F.R.Civ.P.).

Nevertheless, the appellees attempt retroactively to rationalize the District Court's suspension order on the ground that a District Court has equitable jurisdiction to enjoin rates in order to prevent irreparable injury,[12] at least when the Court has concluded on review of a Commission decision that the carriers have failed to meet their statutory burden of proof under § 15(7) (Wichita Br. 44-59; USDA Br. 24-40.) Preliminarily, it should be noted that in any event the appellees' argument has no relevance to this case, since (1) the District Court did *not* find that the charges threatened any irreparable injury and (2) the District Court did *not* remand to the Commission because of any failure to meet a statutory requirement. Instead, as its opinion

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which are not offered by other modes, such as transit and reconsignment, and which are not affected by the inspection charges. And there is clearly no diversion threat where shippers avoid inspections entirely or take the inspections at origin or destination.

[11] Although in this Court the appellees contend that district courts had the authority to enjoin the charges on or after September 29, 1971, the date of the Commission's administratively final decision (Wichita Br. 45), and notwithstanding their claims of irreparable injury, they did not seek to obtain such relief at any time after that date. The complaint in this case (filed November 8, 1971) did not request such relief (A. 79-80); nor did USDA (A. 84).

[12] The grain exchange appellees rely upon an affidavit, appended to their brief, which was not even filed with the District Court until after the entry of its judgment.

makes clear beyond question, the District Court held only (and, we believe, erroneously) that the Commission had "departed" from its prior decisions and had failed to adequately explain the alleged "departure."

Furthermore, for the reasons stated in our main brief, pp. 20-27, the appellees' argument and the District Court's suspension order are in irreconcilable conflict with this Court's decision in *Arrow Transportation Co.* v. *Southern Railway Co.*, 372 U.S. 658 (1963), and the decision in *National Small Shipments Traffic Conference, Inc.* v. *United States*, 321 F.Supp. 500, 515 (S.D.N.Y. 1970). See also Memorandum for the United States filed in this case and Brief for the Interstate Commerce Commission, pp. 42-50. As recognized in *Arrow* and *National Small Shipments*, Congress intended "to vest in the Commission the sole and exclusive power to suspend and to withdraw from the judiciary any pre-existing power to grant injunctive relief" (*Arrow*, 372 U.S. at 667) upon a showing of irreparable injury or otherwise.[13]

Appellees rely on four cases which they characterize as a "well-founded body of precedent" (Wichita Br. 52-54; see also USDA Br. 33, 37) but which on analysis are totally inapplicable. In fact, three of the four were decided long before *Arrow*, and in any event did not even pass on the issue. *Cantlay & Tanzola, Inc.* v. *United States*, 115 F.Supp. 72 (S.D.Calif. 1953); *Inland Steel Co.* v. *United States*, 306 U.S. 153 (1939); *United States* v. *Morgan*, 307 U.S. 183 (1939).

In *Cantlay*, contrary to appellees' misleading statement (Wichita Br. 54), the court (115 F.Supp. at 84) expressly

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[13] Accord: *Oscar Mayer & Co.* v. *United States*, 268 F. Supp. 977, 980 (W.D.Wis. 1967); *Wirthmore Feeds, Inc.* v. *Baltimore and Ohio Railroad Co.*, 221 F. Supp. 745, 746 (W.D.N.Y. 1963); *Port of New York Authority* v. *United States*, 451 F.2d 783, 788 (2d Cir. 1971).

declined to pass on the issue decided ten years later in *Arrow*.

In *Inland Steel*, a § 13(1) case, the injunction referred to in the Court's 1939 opinion (contrary to the implication in USDA's brief, p. 33) did not suspend carrier-made rates but instead set aside a Commission order invalidating a railroad tariff providing for the payment of certain allowances to shippers. The effect of the Court's decree, by setting aside the Commission order, was to let the tariff continue in effect (306 U.S. at 155).

The 1939 decision in *Morgan*, which arose out of a proceeding under the Packers & Stockyards Act, 7 U.S.C. § 181 *et seq.*, is equally irrelevant. Like *Inland Steel*, the *Morgan* case concerned the disposition of a special fund established by a District Court as a condition for the entry of an injunction which set aside an order prescribing reduced rates and thereby left in effect pre-existing rates. In neither case did this Court rule on the propriety of the exercise of injunctive power and, significantly, neither case involved the grant of an injunction in disregard of "a clear congressional purpose to oust judicial power" (*Arrow*, 372 U.S. at 671 n. 22).

The fourth case relied on by appellees is an unreported order referred to in *Ad Hoc Committee on Consumer Protection* v. *United States*, 313 F.Supp. 119, 124 (D.D.C. 1970). The order, remanding the case to the District Court from the Court of Appeals, was entered in emergency session by a two-judge panel, and merely concerned the possible issuance (later granted by the District Court) of a temporary restraining order of twelve days' duration pending immediate review of a Commission order by the District Court. Irrespective of the propriety of such a temporary restraining order for even that limited purpose, it scarcely affords any precedent for the decision below suspending the rates *at the conclusion of the review proceeding* (while simultane-

ously remanding the "matter" to the Commission "for further proceedings"). See our main brief, pp. 25-27.

In short, appellees' so-called "well-founded body of precedent" would not support the District Court's suspension order even if the Court had made findings to support an injunction and had set aside the Commission's order on a different ground. Perhaps recognizing this deficiency, appellees offer a number of additional arguments in an effort to justify the Court's suspension order, but none has any basis in fact or law. Thus, despite the *Arrow* holding, USDA (Br. 25-29, 33; see also Wichita Br. 50-52) argues that the statutory scheme provides for equitable relief, and the grain exchange appellees (Wichita Br. 47, 59) urge this Court to uphold the District Court's suspension order under § 6 of the Administrative Procedure Act (5 U.S.C. § 706).

USDA's analysis of the statutory scheme and its legislative history (which was thoroughly canvassed in the *Arrow* opinion) succeeds only in demonstrating that the Urgent Deficiencies Act of 1913, 38 Stat. 219 *et seq.*, confers jurisdiction to enjoin or set aside Commission orders. But the mere fact that a court is authorized to enjoin *enforcement of an order* does not itself establish any authority in the court to enjoin *the collection of carrier-made rates.* Similarly, the mere fact that a court may exercise equitable power does not bar Congressional limitations on that power. USDA's analysis simply fails to take into account this Court's *Arrow* holding that § 15(7) did indeed withdraw such equitable power from the courts; and clearly there is nothing in the Urgent Deficiencies Act of 1913 to the contrary.

The grain exchange appellees fail to cite any authority in support of their contention that the Commission has "unlawfully withheld" or "unreasonably delayed" agency action within the meaning of § 6 of the Administrative Pro-

cedure Act. Nor have they suggested any reasons why that provision would supersede the command of § 15(7) of the Interstate Commerce Act as interpreted in *Arrow* and *National Small Shipments.*[14]

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[14] The grain exchange appellees (Wichita Br. 59) conclude by requesting this Court to hold that the District Court has the power under § 6 of the Administrative Procedure Act to direct the Commission "immediately to enter an order directing the cancellation of the charges for failing to meet the burden of proof on this record . . . ." Such a request is egregiously improper for a wide variety of reasons. First, there was no failure "to meet the burden of proof on this record," and the District Court did not set aside the Commission order on that basis. (See p. 4, *supra.*) Second, the appellees have failed to establish any right to relief under § 6 of the Administrative Procedure Act. Third, this Court has ruled that a reviewing court has no authority to issue such instructions to an agency on remand. *United States* v. *Saskatchewan Minerals,* 385 U.S. 94, 95 (1966); *Federal Power Commission* v. *Idaho Power Co.,* 344 U.S. 17, 20 (1952).

CONCLUSION

For the foregoing reasons and the reasons stated in our main brief, it is respectfully submitted that the judgment of the District Court should be reversed and the case remanded to that Court with directions to enter a judgment affirming the Commission's order.

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February 21, 1973

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-214

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, ET AL., APPELLANTS

v.

THE WICHITA BOARD OF TRADE, ET AL.

No. 72-433

INTERSTATE COMMERCE COMMISSION, APPELLANT

v.

THE WICHITA BOARD OF TRADE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

REPLY BRIEF OF THE INTERSTATE COMMERCE COMMISSION

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1. In their continuing attack on the Commission's use of the Docket 17000, Part 7, rate level as a yardstick of maximum reasonableness of the in-transit inspection charge when added to existing line-haul rates, appellees once again argue that the Commission has

never relied on such a standard previously and that the Docket 17000, Part 7, rates are merely "paper" rates which provide no proper indication of reasonableness.[1] First of all, we pointed out in our main brief that the Commission has previously utilized prescribed rates as subsequently adjusted by general increases as a measure of maximum reasonableness, even where the operating rate level is lower. See, *e.g.*, ICC Brief, p. 41; *Public Service Commission* v. *Great Northern Ry.*, 340 I.C.C. 739; *Grand Forks Chamber of Commerce* v. *Great Northern Ry.*, 321 I.C.C. 356; *Alabama State Docks Dept.* v. *Alabama, T.&N. R. Co.*, 321 I.C.C. 347, 353; *Aysco Chemicals, Inc.* v. *Alabama G.S.R. Co.*, 314 I.C.C. 725, 733. The question of "paper" rates is but another aspect of the same issue. Rates may be adjusted within a zone of reasonableness (*United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 506), and there is no requirement that the rate prevailing at the moment be considered the highest reasonable rate. *Cf. Alabama State Docks Dept.* and *Aysco Chemical, supra.* Where, as here, a carefully considered maximum level has been developed over the years but for competitive reasons does not always move the traffic, it is nevertheless a valid reasonable maximum. As the Commission has previously recognized,

[1] The Wichita appellees contend that the Commission is precluded by Rule 15 of the rules of this Court from addressing itself to the district court's decision on the merits (Brief, p. 13). However, Commission counsel was assured by the Clerk of Court that it would be proper to discuss all issues presented by both appeals herein in view of the Court's order of November 13, 1972, noting probable jurisdiction and consolidating the appeals.

such a standard may be more reflective of reasonableness than the operating level of rates, which is frequently depressed by competition in a volatile market. See, *e.g., Fargo* v. *Chicago, M., St. P. & P.R. Co.*, 329 I.C.C. 650, 654; *Atlantic Creosoting Co., Inc.* v. *Southern Ry. Co.*, 323 I.C.C. 533, 538; *Whatcom County Traffic and Rates Bureau* v. *Chicago, M., St. P. & P.R. Co.*, 287 I.C.C. 442, 443. The evidence of record clearly shows that such a competitive effect exists in the transportation of grain (see, *e.g.*, Exh. 14, Schedule 4; Exh. 22, Appx. JE2; Exh. 24, pp. 4–5; Exh. 25, p. 2).

2. Now for the first time before this Court, the Wichita appellees raise the question of the effect of the in-transit charges on traffic diversion to competing modes of transportation, and accuse the Commission of improperly shifting a burden of proof to the grain interests. These contentions, which were raised below but not disposed of by the district court, are without merit.

After noting that a likelihood of substantial diversion and a concomitant diminution of railroad revenues was one of its reasons for rejecting increased charges in *Transit Charges, Southern Territory*, 332 I.C.C. 664, the Commission found in the instant case that "[s]imilar conclusions are not warranted here" (App. 39). This was an entirely justifiable conclusion in view of appellees' conspicuous failure to back up claims of diversion which could best be supported by their own evidence.

This Court has held that if a carrier in a Section 15(7) proceeding demonstrates that its proposed rate will be just and reasonable with respect to its own revenue requirements, an opposing carrier claiming inherent cost advantages has the burden of persuading the Commission of the existence of those advantages. *Interstate Commerce Commission* v. *New York, N.H. & H. R. Co.*, 372 U.S. 744, 760 n.12. The situation here is materially the same. The railroads showed a favorable revenue effect from the in-transit charges in two respects: to the extent they were collected they were reasonable; and, to the extent inspection was bypassed, a vastly improved revenue picture would result from increased car utilization (App. 55, 57).

Against this background, appellees failed markedly to substantiate any reasonable claim of diversion, and such evidence as was presented was quickly rebutted by the railroads. A number of witnesses made generalized claims before the Commission that shippers would direct traffic to other modes because of the inspection charge, but none successfully established either the relative costs involved or, equally important, the causal connection between diversion to other modes and this particular charge. In contrast, the railroads were able to show, *inter alia,* that unregulated truck and barge rates fluctuate constantly and tend to parallel rail rates (Exhibit 146, p. 5); and that the inspection charge, in the context of all things affecting competition between railroads and other modes, would have little if any significant impact. As an example of this latter point, the railroads established by cross-examination of a witness relied on by

the grain interests that motor carriers are generally used for short-haul traffic in any event and the inspection charge would not likely alter the competitive balance (R. 1237), and that rail transportation is used in some instances even when motor transportation is cheaper because of other advantages, such as transit privileges and greater accessibility to markets (R. 1238–40). On such facts the Commission properly concluded that it could not find that diversion would result from imposition of the in-transit charge.

The Commission in no way shifted the burden of proof to appellees by its treatment of the diversion question. Diversion is largely a matter within a shipper's competence to prove, since the choice of transportation is his decision to make; the Commission has accordingly required that such claims be supported by those who make them. *E.g., Increased Freight Rates, 1968,* 332 I.C.C. 714, 716; *Chesapeake & O. Ry. Co.—Control—Baltimore & O.R. Co.,* 317 I.C.C. 261, 282. This Court has agreed that parties raising issues within their own competence to illuminate with evidence have the obligation to do so regardless of the ultimate burden of proof. *Interstate Commerce Commission* v. *New York, N.H. & H.R. Co., supra; Interstate Commerce Commission* v. *J–T Transport Co.,* 368 U.S. 81, 90. Such a requirement neither "bears upon" the burden of proof nor "subverts" it (*United Gas Pipe Line Co.* v. *Federal Power Comm'n,* 206 F. 2d 842, 845 (2d Cir.)), and in fact equitably distributes obligations in an administrative proceeding for the purpose of arriving at the truth without unreasonable difficulty and expense. *Atlanta-New Orleans*

Motor Frt. Co. v. *United States,* 197 F. Supp. 364 (N.D. Ga.). No one disputes that the railroads here had the ultimate burden in this proceeding to show the inspection charge to be just and reasonable, but to infer that the Commission unlawfully shifted the burden on the diversion issue is unwarranted.

3. The Wichita appellees seek to cast the inspection charge in terms of an intention of the railroads and the Commission to destroy the grain marketing system as it has heretofore existed. This argument is deficient for several reasons.

Throughout these proceedings appellees have faulted the Commission for its method of arriving at the overall *level* of rates caused by imposition of the separate charge for inspection. But in defending in-transit inspection as an integral part of a marketing system they wish to protect, the Wichita appellees in effect are saying that there should be no avoidable separate charge for this service at all. Any such conclusion completely, even callously, disregards the evidence of disruptions caused by the in-transit inspection process, and is clearly an attempt to substitute the judgment of private parties for that of the Commission.[2]

The Wichita appellees suggest that the Commission misused the legislative history of the 1968 amend-

[2] It is noteworthy that the Secretary of Agriculture makes no similar contention; in fact, he states that the imposition of a separate charge may be justified and that it is the imposition of such a charge which tends to discourage in-transit inspection (USDA Brief, p. 23). Thus even the Secretary implicitly acknowledges the deficiencies in the Wichita appellees' defense of in-transit inspection.

ments to the Grain Standards Act as support for its approval of the in-transit charge. Such an argument misapprehends the purpose behind consideration of that legislative history. Congress did not by that legislation expressly authorize a separate inspection charge, but it did nonetheless evince the hope that removal of the mandatory inspection requirement would improve car utilization and efficiency of operations generally (see ICC Brief, pp. 18–24). For appellees now to rely upon the subsequent failure of in-transit inspections to decline in number as evidence that Congress did not intend to eliminate them misconstrues the evidence completely. No other conclusion can reasonably be drawn than that Congress obviously hoped for a substantial reduction in the number of in-transit inspections.[3]

The legislative history of the 1968 amendments also shows that nearly everyone involved with grain transportation, including a large number of the present appellees, agreed with Congress that in-transit inspection is a seriously disruptive practice. For appellees now to suggest that the very procedure which was admittedly so seriously deficient in 1968 is now essential to the health of the grain trade constitutes incon-

[3] Congress' continuing concern over car utilization and efficient transportation of grain, of which we spoke in our main brief (pp. 18–24), was most recently evidenced by the passage of a Senate resolution "relating to the railroad transportation crisis caused by the freight car shortage and other factors." See S. Res. 59, 93d Cong., 1st Sess., February 19, 1973; S. Rep. No. 93-16.

sistency and indifference to the consequences of inefficient transportation of grain.

Ultimately involved is the question of who is the guardian of the public interest—the Commission or the grain concerns. This Court has clearly held that this task belongs to the Commission, which is delegated this responsibility by Congress. The Commission must perform this function even if, as these appellees claim, some segment of the economy may be affected adversely by its decisions. *Interstate Commerce Commission* v. *Mechling,* 330 U.S. 567, 580; *Dixie Carriers* v. *United States,* 351 U.S. 56, 60; *Arrow Transp. Co.* v. *United States,* 176 F. Supp. 411, 420 (N.D. Ala.) aff'd *per curiam,* 361 U.S. 353. Compare *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658 (dissenting opinion).

4. In their defense of the district court's unlawful arrogation of the power to suspend rates, appellees continue to maintain that such a power is condoned by the case law and mandated by policy. Such contentions are without foundation.

In arguing that *Arrow Transp. Co.* v. *Southern Ry.,* 372 U.S. 658, is inapplicable to the present situation, appellees profess to see legislative history and judicial precedent which support the lower court's suspension of the in-transit charge. Thus the Secretary of Agriculture, in a lengthy discussion of the Mann-Elkins Act of 1910, 36 Stat. 539, perceives in the creation of the Commerce Court, and its subsequent abolition and transfer of jurisdiction to three-judge district courts, a Congressional intention to authorize court injunctions against rates. Similar contentions are made by

the Wichita appellees on the basis of extracts from the Congressional debates on the Mann-Elkins Act. But, as the language of the present judicial review statutes makes clear, it is injunctions against *Commission orders* which may be granted by the reviewing courts in their discretion, a point not disputed by appellants. See 28 U.S.C. §§ 1336(a), 1398(a), 2284(5), 2321, 2324, 2325. Indeed, the passages of legislative history cited by appellees say nothing about any supposed power to enjoin rates but merely describes the power being conferred on the courts to enjoin Commission orders—an entirely different matter. As Judge Friendly expressly held in *National Small Shipments Traffic Conference* v. *United States,* 321 F. Supp. 500, 515 (S.D. N.Y.), relying squarely on *Arrow,* a court's power to annul, set aside, vacate, or permanently enjoin a Commission *order* does *not* embrace a power to enjoin the continued application of rates.[4] That power, as this Court held in *Arrow,* lies exclusively in the Commission.

Appellees additionally suggest that a power of the district court to suspend rates pending reconsideration by the Commission must be inferred from the "equitable powers" of the reviewing court—powers

[4] The Secretary of Agriculture argues that *National Small Shipments* is inapposite because the court there held only that it could not direct the *Commission* to suspend the rates in question (USDA Brief, p. 35). But it is precisely because the court interpreted *Arrow* to mean that only the *Commission* can suspend (and that the suspension period had already been used up) that the court found itself without power to suspend the rates further. Of all the lower court cases relating to *Arrow* cited by the parties, *National Small Shipments* is quite obviously most in point.

allegedly necessary to prevent harsh results against shippers. What appellees fail to recognize is that the seven-month suspension period is in itself a substantial concession to shippers in the context of what is basically a carrier management decision, *i.e.*, whether or not to change the level of rates. Section 15(7)'s authorization of a limited seven-month suspension of a rate change, coupled with the power granted the Commission thereafter to require an accounting and refund, reflect what this Court in *Arrow* recognized as a carefully considered Congressional judgment as to the length of time a carrier should be prevented from instituting its own rate changes, and the extent to which affected shippers should be protected from the consequences of such changes. That judgment is dispositive of this issue. With this in mind it cannot reasonably be argued that the courts would be given back the power to suspend which was taken away in the first instance, thereby upsetting the delicate balance between carrier and shipper so carefully delineated by Congress. *Arrow, supra,* 372 U.S. at 664.

The Wichita appellees suggest further that a failure to permit judicial suspension in connection with a court remand subjects shippers to higher rates during an unduly long period of time while the Commission reconsiders the rate proposal.[5] But this argument as-

[5] Of course, the district court here purported to suspend not only during the period of reconsideration, but also until further order of the court itself (App. 106). This provision thus seems to envision a second round of judicial review, despite the fact that the Commission has not yet acted and no one knows in advance what the result would be if reconsideration does take place.

sumes that the Commission proceeding on remand will necessarily be a protracted one. There is no basis for such an assumption. Here, the lower court reversed the Commission's decision essentially upon the basis of what that court regarded as inadequate findings. On remand, it would not appear to be necessary to conduct further proceedings, and a decision incorporating additional findings should be forthcoming within a relatively short period of time. And in any event both the Commission and the courts possess ample power to prevent excessive delays or other abuses of the administrative process. Compare *City of New York* v. *United States*, 337 F. Supp. 150, 164 (E.D. N.Y.); *In re Penn Central Transportation Co.*, 329 F. Supp. 572, 577 (E.D. Pa.); *Middlewest Motor Freight Bureau* v. *United States*, 433 F. 2d 212, 225 (8th Cir.).

Finally, we submit that appellees' emphasis on the plight of the shippers is completely one-sided, and ignores the equally compelling plight of the railroads if their contentions were to be adopted. In order for shippers to enjoy the benefit of further suspension when the charges in question have never been found by the Commission not to be just and reasonable, the railroads would have to bear irretrievable losses during the period of suspension, with no hope of recouping any of the lost revenues if the rates are ultimately found to be lawful. These losses would have to be added to losses already borne by the carriers during the initial seven-month suspension period authorized by Congress. As pointed out in our main brief (*e.g.*, p. 50), this very case illustrates the gravity of the prob-

lem: if suspension were now permitted, the entire in-transit charge, with its demonstrably beneficial effect on car supply and carrier operations, would be summarily discarded. That is just the kind of eventuality which this Court in *Arrow* recognized and sought to avoid.

For the reasons stated herein and in our main brief, it is respectfully submitted that the judgment of the district court should be reversed, and the case remanded with directions to sustain the Commission's orders under review.

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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ATCHISON, TOPEKA AND SANTA FE RAILWAY CO. ET AL. *v.* WICHITA BOARD OF TRADE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS

No. 72-214. Argued February 28, 1973—Decided June 18, 1973*

The Interstate Commerce Commission (ICC), after hearings, approved imposition by appellant railroads of separate charges for inspection of grain while in transit, a service that had previously been provided under the line-haul rates. Appellees thereupon brought this action in District Court contesting the validity of the ICC order. That court found that the ICC had not adequately justified departure from its longstanding rule that such separate charges are unlawful unless the carriers can satisfy the burden that rests upon them of proving that their line-haul rates are insufficient to cover the total transportation service including the portion thereof for which separate charges are proposed. The court ordered suspension of the in-transit charges unless otherwise ordered by the court and remanded the case to the ICC. *Held:* The action of the District Court is affirmed as to the remand to the ICC and is reversed as to the injunction suspending the proposed charges. Pp. 5 – —. 352 F. Supp. 365, affirmed in part and reversed in part.

MR. JUSTICE MARSHALL, in an opinion joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN, concluded that:

1. The ICC, which justified its departure from its prior cases on the ground that the many rates involved rendered the previous requirement impractical and the new charges when added to the line-haul rates would not exceed the ICC-prescribed maximum rate level, has not stated its reasons with sufficient clarity

*Together with No. 72-433, *Interstate Commerce Commission* v. *Wichita Board of Trade et al.*, also on appeal from the same court.

Syllabus

to facilitate proper judicial review of its approval of the in-transit inspection charges. Pp. 5–16.

2. Equitable considerations, including the doctrine of primary jurisdiction as applied to the facts of this case, required that the District Court refrain from expressing a view upon what it believed was permitted by national transportation policy before the ICC on remand could balance the conflicting interests of shippers, railroads, producers, and consumers in the proposed rate changes, cf. *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658; hence, it was improper for the District Court to enjoin implementation of the proposed new charges. Pp. 16–24.

MR. JUSTICE DOUGLAS concurred in the affirmance of the remand to the ICC.

MR. JUSTICE WHITE, joined by MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST, concurring in the reversal of the injunction, concluded that only the ICC was granted the statutory authority to suspend new freight rates for seven months and the District Court has no power to extend that period. Pp. 1–2.

MARSHALL, J., announced the Court's judgment and delivered an opinion, in which BURGER, C. J., and STEWART and BLACKMUN, JJ., joined. DOUGLAS, J., filed an opinion concurring in the affirmance of the remand to the Interstate Commerce Commission and dissenting from the reversal of the decree authorizing the injunction. WHITE, J., filed an opinion concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the Interstate Commerce Commission, in which BRENNAN and REHNQUIST, JJ., joined. POWELL, J., took no part in the consideration or decision of the cases.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

Nos. 72-214 AND 72-433

The Atchison, Topeka and Santa Fe Railway Company et al., Appellants,
72-214 *v.*
The Wichita Board of Trade et al.

Interstate Commerce Commission, Appellant,
72-433 *v.*
Wichita Board of Trade.

On Appeals from the United States District Court for the District of Kansas.

[June 18, 1973]

MR. JUSTICE MARSHALL announced the judgment of the Court, and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE BLACKMUN join.

We noted probable jurisdiction in these cases to resolve two important questions relating to the proper role of courts in reviewing approval by the Interstate Commerce Commission of proposed rate increases by railroads. 409 U. S. 1005 (1972). First, under what circumstances may a reviewing court find that the Commission has failed adequately to explain its apparent departure from settled Commission precedent? Because the problem of determining what policies an agency is following, as a prelude to determining whether the agency is acting in accordance with Congress' will, is a recurring one, this issue raises general problems of judicial review of agency action. The second question in this case is a more limited one: in order to enjoin a proposed rate increase after

a final order by the Interstate Commerce Commission, what sort of error must a District Court find in the proceedings of the Commission? We hold that in this case the Commission did not explain its apparent departure from precedent in a manner sufficient to permit judicial review of its policies, but that, nevertheless, that kind of error does not justify the District Court in entering an injunction against imposition of the rates pending review of the Commission's action on remand. We therefore vacate the judgment of the District Court and remand for the entry of a proper order.[1]

I

In this case, the railroads proposed to establish a separate charge for inspection of grain while in transit.[2] In order to inspect the grain, the railroad cars loaded with it are stopped and placed on track facilities. A sample of the grain is taken, and the official grade is determined. Once the grade is known and the commercial value of the grain established, the shipper orders the car to proceed to the appropriate market. In-transit inspections have substantial advantages to shippers over

[1] We have previously stayed the judgment of the District Court on condition that appellant railroads keep accounts of the amounts received from the in-transit charges. 409 U. S. 801 (1972). We hereby direct the District Court to enter an order, consistent with this opinion, regarding the disposition of those amounts.

[2] Such a charge is already made for the first in-transit inspection in the Eastern Territory. The proposed rates would increase that charge from $7.42 to $14.33. There would be a slight increase in the currently effective charge for the second and subsequent inspections. A large majority of the number of in-transit inspections occur in the Western Territory, where most of this country's grain is produced and where no separate charge is now made for the first in-transit inspection. Only a few cars are stopped for more than one inspection. Thus, for convenience of exposition, we treat this case as involving a proposal for a separate new charge; that is the real effect of the railroads' proposal in most instances.

inspection at the destination. If the grain were to be found to be of a different grade than expected only after arrival at the destination, sending it to another market might be quite expensive. The advantages to purchasers of in-transit inspections, instead of inspection at the source that might satisfy shippers, are less marked but are nonetheless significant. The grain might deteriorate while in transit, thus leaving the purchaser with grain of a lower quality than he expected. And the possibility of bias of the inspector is greater if the inspection is made at the source.

The Commission found that "the orderly marketing of grain under present practices requires that a substantial portion of the commodity moving in commercial channels must be subjected to some form of sampling and inspection to determine grade or quality." 339 I. C. C. 364, 385 (1971).[3] However, it also found that this sampling need not take place while the grain is in transit. The practice of in-transit inspections developed when federal law required inspections for the purpose of grading. 39 Stat. 483 (1916). But the diversion of grain from railroads to motor trucks made it difficult to enforce the inspection requirements. When trucks are used, in-transit inspections are not generally made. Thus, in order to simplify the movement of grain, Congress abolished the requirement of inspections. Pub. L. 90-487, 82 Stat. 761 (1968). In addition, the convenience of sampling at the source of the grain has increased with the widening reliance on low-cost mechanical samplers installed at grain elevators. The Commission therefore concluded that in-transit inspections were not necessary for the orderly marketing of grain.

[3] The report of Division 2 of the Commission is found at 339 I. C. C. 364. The entire Commission "adopt[ed] and affirm[ed] the findings and conclusions reached" in that report. 340 I. C. C. 69, 70 (1971).

It also concluded that in-transit inspections resulted in a substantial decrease in the number of freight cars available for general use.[4] Relying on a variety of studies conducted by the railroads, the Commission found that each inspection kept a freight car out of use for roughly three days, and that the cumulative impact of the delays due to in-transit inspection is to reduce the available freight car fleet by several thousand cars.

Finally, the Commission considered whether the proposed separate charge for each in-transit inspection fairly reflected the cost to the railroad of such an inspection. Again it relied on quite detailed studies that established the cost of detaining a car, the cost of switching it on and off the main line, and the clerical costs of conducting inspections. The Commission concluded that the proposed charges were "not excessive in amount . . . on the basis of the convincing evidence of record showing the costs sustained by the railroads in performing the in-transit inspection service." 340 I. C. C., at 71–72.

Shippers who had objected to the proposed new charges before the Commission sought review of the Commission's order, and a statutory three-judge District Court was convened. The District Court found that these conclusions were supported by substantial evidence, and they are not challenged here. But the District Court held that the Commission had not adequately justified its failure to follow "its long-established rule that it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefrom." 352 F. Supp. 365, 368. The Commission, although it analyzed the cost of each in-transit inspection,

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[4] For a description of the car-utilization problem, see *United States v. Allegheny-Ludlum Steel Corp.*, 406 U. S. 742, 745–746 (1972).

had made no attempt to consider the reasonableness of continuing the existing line-haul rate, which included some charge for in-transit inspections. Instead, the Commission had attempted to distinguish this case from prior cases in which the rule was invoked, but the District Court, relying on *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1954), was "not convinced that the instant proceeding can be 'distinguished' as the Commission has indicated." 352 F. Supp. 365, 369.

Although the Commission must be given some leeway to re-examine and reinterpret its prior holdings, it is not sufficiently clear from its opinion that it has done so in this case. A reviewing court must be able to discern in the Commission's actions the policy it is now pursuing, so that it may complete the task of judicial review—in this regard, to determine whether the Commission's policies are consistent with its mandate from Congress. Since we cannot tell from the Commission's opinions what those policies are, we therefore agree with the District Court that the Commission's order finding the rates just and reasonable cannot be sustained.

II

Judicial review of decisions by the Interstate Commerce Commission in rate cases necessarily has a limited scope. Such decisions "are not to be disturbed by the courts except upon a showing that they are unsupported by evidence, were made without a hearing, exceed constitutional limits, or for some other reason amount to an abuse of power." *Manufacturers R. Co.* v. *United States*, 246 U. S. 457, 481 (1918).[5] As this Court has observed, "The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforce-

[5] See also 5 U. S. C. § 706 (2).

ment of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems." *Board of Trade of Kansas City* v. *United States*, 314 U. S. 534, 546 (1942).

The delegation to the Commission is not, of course, unbounded, and it is the duty of a reviewing court to determine whether the course followed by the Commission is consistent with its mandate from Congress. See *ICC* v. *Inland Waterways Corp.*, 319 U. S. 671, 691 (1943); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156, 167–169 (1962). Cf. *NLRB* v. *Wyman-Gordon Co.*, 394 U. S. 759, 767 (1969). But a simple examination of the order being reviewed is frequently insufficient to reveal the policies that the Commission is pursuing. Thus, this Court has relied on the "simple but fundamental rule of administrative law," *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), that the agency must set forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong." *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 511 (1935). See also *Phelps Dodge Corp.* v. *NLRB*, 313 U. S. 177, 197 (1941); *SEC* v. *Chenery Corp.*, 318 U. S. 80, 94 (1943). And we must rely on the rationale adopted by the agency if we are to guarantee the integrity of the administrative process. *SEC* v. *Chenery Corp.*, 318 U. S., at 88. Cf. *NLRB* v. *Metropolitan Life Ins. Co.*, 380 U. S. 438, 443–444 (1965). Only in that way may we "guard against the danger of sliding unconsciously from the narrow confines of law into the more spacious domain of policy." *Phelps Dodge Corp.* v. *NLRB*, 313 U. S., at 194.

An agency "may articulate the basis of its order by reference to other decisions," *NLRB* v. *Metropolitan Life*

Ins. Co., 380 U. S., at 443 n. 6. For "[a]djudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein. See H. Friendly, The Federal Administrative Agencies 36–52 (1962). They generally provide a guide to action that the agency may be expected to take in future cases. Subject to the qualified role of *stare decisis* in the administrative process, they may serve as precedents." *NLRB* v. *Wyman-Gordon Co.*, 394 U. S., at 765–766 (opinion of Fortas, J.). This is essentially a corollary of the general rule requiring that the agency explain the policies underlying its action. A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress.

There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to. From this presumption flows the agency's duty to explain its departure from prior norms. *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 653 (1954). The agency may flatly repudiate those norms, deciding, for example, that changed circumstances mean that they are no longer required in order to effectuate congressional policy. Or it may narrow the zone in which some rule will be applied, because it appears that a more discriminating invocation of the rule will best serve congressional policy. Or it may find that, although the rule in general serves useful purposes, peculiarities of the case before it suggest that the rule not be applied in that case. Whatever the ground for the departure from prior norms, however, it must be clearly set forth so that the reviewing court may understand the basis of the agency's action and so may judge the consistency of that action with the agency's mandate.

A further complication arises when, as in the present case, the agency distinguishes earlier cases in which it

invoked the rule. An initial step, and often the only one clearly taken, is to specify factual differences between the cases. Those factual differences serve to distinguish the cases only when some legislative policy makes the differences relevant to determining the proper scope of the prior rule. It is all too easy for a court to judge the adequacy of an asserted distinction in light of the policies the court, rather than the agency, seeks to implement; that is, after all, what an appellate court does with respect to courts of the first instance. Yet when an agency's distinction of its prior cases is found inadequate, the reviewing court may inadvertently adopt the stance it ordinarily takes with respect to other courts, and thereby may invade "the domain which Congress has set aside exclusively for the administrative agency," *SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947), that is, the choice of particular actions to carry out the broad policies stated by Congress. Instead, it is enough to satisfy the requirements of judicial oversight of administrative action if the agency asserts distinctions that, when fairly and sympathetically read in the context of the entire opinion of the agency, reveal the policies it is pursuing. So long as the policies can be discerned, the court may exercise its proper function of determining whether the agency's policies are consistent with congressional directives.

These principles gain content when applied to the present case. The District Court held that the Commission had not repudiated or adequately distinguished its prior cases establishing the rule that "it will not allow a separate charge for an accessorial service previously performed as part of the line-haul rates without substantial evidence that such an additional charge is justified measured against the overall services rendered and the overall reasonableness of the increased line-haul rate resulting therefore." While this is a fair summary of the Com-

mission's established practice,[6] it conceals the apparent purpose of the rule, to protect two distinct classes: shippers who will continue to utilize the accessorial serv-

[6] The rule has been stated in other ways. See, *e. g.*, p. 4, *supra*. In *Transit Charges, Southern Territory*, 332 I. C. C. 664, 683 (1968), the Commission stated the rule in these terms: "[T]he proposed charge may not be divorced from the line-haul rate, for both, insofar as transit is concerned, are inextricably interdependent. [Citations omitted.] While it would seem preferable to have the various elements entering into, and constituting, the whole analyzed, if indeed they could be separated, the entire transportation service rendered, including transit, must be examined in relation to the total rates and charges assessed." The District Court reviewing that case rephrased the rule: "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable." *Cincinnati, N. O. & T. P. R. Co.* v. *United States* (Civil Action No. 6992, U. S. D. C. Southern Ohio, Jan. 12, 1970), aff'd, 400 U. S. 932 (1970). The District Court continued, somewhat more obscurely: "Whether the examination is in terms of 'what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the non-severed)—the principle is the same." And in *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 654 (1945), this Court referred to it as "the prevailing rule . . . that a service necessarily encompassed by the line-haul rate cannot be separately restated without examining the sufficiency of the line-haul rate to cover it."

ice—in this case, those who will still have their grain inspected while in transit—and shippers who will not. To decide whether the Commission has adequately explained its failure to follow that rule, we must consider each class in turn, for the Commission may have made clear why it need not protect one class by invoking the rule but it may nonetheless have failed to say why it need not protect the other class.

In *Unloading Lumber in New York Harbor*, 256 I. C. C. 463 (1943), the Commission dealt with a proposal to charge separately for unloading, a service that was inextricably bound up with the line-haul service. Cf. *Secretary of Agriculture* v. *United States*, 347 U. S., at 648–649. The Commission said, "It follows that respondents may not now segregate a component of that [line-haul] service, making a separate charge therefor, without an adequate showing that the aggregate charge for the through service is reasonable." 256 I. C. C., at 468. The explicit purpose of the rule in this situation is to guarantee that shippers receiving the same service that they had previously received do not pay an unreasonable amount. See also *Duluth Dockage Absorption*, 44 I. C. C. 300 (1917); *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673, 682 (1943). The rule, in this regard, is that the railroads must demonstrate both that the proposed charge is reasonable in light of the costs of the separate service, and that the total charge for line-haul plus the separate service is reasonable.

The Commission justified its departure from its prior cases by giving two reasons that relate to this aspect of the rule. First, it noted that "[t]he line-haul rates applicable on the grain to, from, and through [the] inspection points number in the thousands and, because of the complexities of the grain rate structures, vary to a large degree." Thus, applying the general rule "effectively precludes respondents from ever establishing a sepa-

rate charge for the accessorial first stop for inspection regardless of the need for such a charge." Second, the Commission said that "the line-haul rate applicable to any movement of grain . . . when coupled with the proposed charge is less than the maximum reasonable level determined by this Commission. In no instance will the combined rate and charge exceed the maximum level prescribed in *Grain and Grain Products* [, 205 I. C. C. 301 (1934) and 215 I. C. C. 83 (1936)]." 339 I. C. C., at 386–387.

The maximum rates prescribed in *Grain and Grain Products* have been subjected to a large number of general rate increases.[7] See, *e. g., Ex parte Nos. 265 and 267, Increased Freight Rates, 1970 and 1971*, 339 I. C. C. 125 (1971). In those proceedings, the Commission's focus is on the general revenue needs of the railroads. Across-the-board percentage increases are permitted without detailed examination of individual rates. As a result, there may be specific routes on which the maximum is in fact unreasonable, because, for example, the costs of operating those routes have not increased as rapidly as the costs elsewhere. Thus, the Commission has held that its approval of a general increase "does not have the effect of approving any particular increased rate as not being in excess of a maximum reasonable rate." *Coal from Illinois to Alton and East St. Louis*, 274 I. C. C. 637, 670 (1949). See also *Tennessee Produce & Chemical Corp.* v. *Alabama G. S. R. Co.*, 277 I. C. C. 207 (1950); *Brimstone R. Co.* v. *United States*, 276 U. S. 104 (1928). However, in other contexts, the Commission has treated the prescribed rates as modified by

[7] Currently effective rates are, on almost every route, lower than the rates permitted by the general maximum. See 340 I. C. C., at 71. Often this results from competition from other modes of transport which forces rates below what the railroads would like to charge.

general increases as "the best evidence of the reasonableness of corresponding rates at a . . . date" after the general increase. *Agsco Chemicals, Inc.* v. *Alabama G. S. R. Co.*, 314 I. C. C. 725, 733 (1961). Cf. *Public Service Comm'n of North Dakota* v. *Great Northern R. Co.*, 340 I. C. C. 739, 750 (1972).

The Commission thus has not determined that a rate which does not exceed the current general maximum is reasonable. A shipper can challenge any such rate as unreasonable and, if he succeeds, may recover reparations. In addition, the Commission may prescribe a rate to be charged in the future. 49 U. S. C. §§ 8, 9, 13 (1), 15(1); *ICC* v. *Inland Waterways Corp.*, 319 U. S. 671, 687 (1943). In such proceedings, the shipper must show that the rate charged was unreasonable. Cf. *Louisville & N. R. Co.* v. *United States*, 238 U. S. 1 (1915); *Shaw Warehouse Co.* v. *Southern R. Co.*, 288 F. 2d 759 (CA5 1961).[8] In contrast, when a proposed rate increase is challenged by a shipper before it goes into effect, "the burden of proof shall be upon the carrier to show that the proposed changed rate . . . is just and reasonable." 49 U. S. C. § 15 (7).[9]

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[8] MR. JUSTICE WHITE argues that, if a rate at the level of the general maximum is reasonable, and if the separate charge is reasonable, then surely a line-haul rate that is equal to the general maximum less the separate charge is reasonable. The flaw in his argument is that the Commission has never determined that rates at the level of the current general maximum are reasonable. That is, in the example suggested by MR. JUSTICE WHITE, the Commission has not determined what he says that it has "previously found—that 120 is a reasonable charge for both services." Without this premise, his argument fails.

[9] If the Commission finds that the proposed rates are unreasonable, rather than that the railroads failed to carry their burden of proof, that finding might be conclusive in a subsequent proceeding. Cf. *Mitchell Coal & Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247, 258 (1913); *ICC* v. *Atlantic Coast Line R. Co.*, 383 U. S. 576, 590–594 (1966). This does not, however, affect the burden placed on carriers in the suspension proceedings.

The Commission in this case referred to the burden that applying the rule would place on the railroads. It rather clearly intended by this to suggest that the importance of implementing the new charges and so of increasing the supply of available freight cars justified some modification of its usual allocation of the burden of going forward. Instead of requiring the railroads to produce substantial evidence that the total charges were reasonable, it would leave that determination to later proceedings in which a shipper seeking reparations might point to particular individual charges as unreasonable.

If this were all that was at stake, the Commission would have adequately identified the concerns behind its course—in light of the pressing need to increase the freight car supply, it was not too much to require that shippers carry the burden of going forward. Such an assessment would surely permit a reviewing court to determine whether the Commission's action was consistent with congressional transportation policy. Unfortunately, though, the change involved in making the shippers claim that particular rates are unreasonable is not all that is at stake. For in proceedings for reparations, there is also a change in the burden of proof: the shipper must produce substantial evidence that the rate is unreasonable. This would appear to affect the likelihood that the shipper will prevail. There is a zone in which rates are reasonable, *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U. S. 499, 506 (1935), and it would seem to be harder to establish that the proposed rates fell outside that zone than that they fell within it. Or so Congress believed, for it specified the allocation of the burden of proof in suspension proceedings as part of the cost to the carriers; in return for confining the power to suspend rates to the Commission, and so of eliminating the threat of long drawn out injunctive proceedings in the courts, Congress made the carriers carry

a burden of proof that would otherwise not have been theirs. Cf. Part III, *infra*.[10]

The Commission did not suggest that its approval of the proposed rates on the grounds it gave would alter the usual practice in actions for reparations. Nor did it say why the need for an increased supply of freight cars justified a significant change in the burden of proof. In this sense, the Commission's action was, as the District Court noted, "discriminatory per se."

It is even harder to understand from the Commission's opinion why it departed from the rule in prior cases protecting shippers who decide not to have in-transit inspections. If the separate charges are to be effective in alleviating the car-shortage problem, there must be a substantial number of shippers who do not seek in-transit inspections. Yet according to the Commission, the railroads need not show that the present line-haul rates are reasonable charges for the services provided to shippers who do not seek in-transit inspections. It

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[10] The argument urged in support of the Commission's order is, in essence, that the separate charge approved by it was just like a general rate increase because of the breadth of its application. However, the Commission did not use the language characteristic of general increase proceedings. See, *e. g.*, *Ex parte 259, Increased Freight Rates, 1968*, 332 I. C. C. 714, 715, 792 (1968). And, if this were just like a general rate increase, serious questions would arise about the jurisdiction of the District Court to review the Commission's order. See *Atlantic City Electric Co.* v. *United States*, 306 F. Supp. 338 (SDNY 1969); *Alabama Power Co.* v. *United States*, 316 F. Supp. 337 (DC 1969), both aff'd by an equally divided court, 400 U. S. 73 (1970). Yet, although the parties have cited those cases to us, see Brief of the Interstate Commerce Commission, at 35, Brief of the Secretary of Agriculture, at 18, Brief of Wichita Board of Trade, at 32, they have not contended at any length that the District Court lacked jurisdiction over this case. This suggests that the parties, including the Commission, do not interpret the Commission's opinion as resting on the similarity between this case and general rate increase cases.

would appear, thus, that the Commission has approved a policy that discriminates against what it hopes will be a very large number of shippers; it seems to have tried to justify its policy by citing reasons that affect only a much smaller class.

Some of the shippers who previously sought in-transit inspections will no longer do so. Others had the opportunity for such inspections. Now the railroads propose to eliminate some of the service previously provided yet charge the same rates. The Commission in its prior cases has required railroads proposing a similar reduction in service either to show that the rates then in effect did not compensate them for the service, and thus that the service was being provided at no charge, or to reduce the existing rates. See, *e. g., Transit Charges, Southern Territory,* 332 I. C. C. 664, 683 (1968); *Loading of Less-Than-Carload Freight at Norfolk Harbor,* 91 I. C. C. 394 (1924); *ICC* v. *Chicago, B. & Q. R. Co.,* 186 U. S. 320 (1902).

Nothing the Commission said suggests any reason why the railroads should not be required to follow the same rule in this case. At no time have rates ever been established, or found just and reasonable, when the railroads did not include the service of in-transit inspection. Perhaps the imperative need to increase the number of freight cars available to all shippers justifies some alteration of the general rule. Yet the Commission, when dealing with shippers who will continue to have in-transit inspections, invoked the fact that the new charges would not raise rates above those permitted by the general maxima. As to that class, the Commission apparently believed that it could not simply refuse to follow preexisting practices on the ground of exigency alone. The Commission offered no reason to distinguish the larger class from the smaller one, in that respect. But it might be that rates for services including an in-transit inspec-

tion, at the level of the general maximum, would be reasonable while rates for services without such inspections would be unreasonable at that level, or even below it. Thus, the fact that the new charges will not exceed the general maximum seems to have no bearing on the question of the reasonableness of the rates that will continue to be in force for now-reduced services.[11]

Perhaps the current line-haul rates really do not include a substantial amount attributable to the cost of providing in-transit inspections. But cf. Transcript of Hearing, at 231–232, 258–266. Or perhaps the Commission has some reason to reinterpret the prior cases suggesting that its rule reflects a concern for rates that are "increased" simply because of a reduction in services.

As in *Secretary of Agriculture* v. *United States*, 347 U. S. 645, 652 (1954), the Commission may have reasons for "following a procedure fairly adapted to the unique circumstances of this case."[12] But, as in that case, it must make these reasons known to a reviewing court with sufficient clarity to permit it to do its job. Even giving the Commission's opinion the most sympathetic reading that we find possible, we cannot discover in it an expressed reason for permitting the railroads to reduce their services without showing that the rates they

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[11] The Commission may have intended to leave this question for later proceedings. But this course runs into the difficulties noted above, *supra*, p. 13.

[12] On remand, the Commission might explain more fully the course it followed, or it might adopt a different course, for example, by requiring the carriers to demonstrate the reasonableness of the line-haul rates for services provided without an in-transit inspection on a representative sample of routes. Most of the prior cases in which the Commission invoked the rule involved quite limited problems, often confined to a single route. But cf. *Transit Charges, Southern Territory*, 332 I. C. C. 664 (1968). If the Commission then explained why that procedure was responsive to the needs of the particular case, the prerequisites of judicial review would be satisfied.

propose to maintain are reasonable rates for the service they intend to provide.

III

After holding that the matter must be remanded to the Interstate Commerce Commission for further proceedings, the District Court ordered, "The proposed charges are suspended and shall be ineffective until and unless otherwise ordered by this Court." No reasons for such an order were given; the District Court did not, for example, specify the nature of the harm to the shippers that would, presumably, injure them irreparably. Nor did it explain the basis for its apparent belief that *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963), was distinguishable.

It was error to enter such an injunction. The District Court clearly had power to suspend the operation of the Commission's order pending the final determination of the shippers' suit. That power is given in terms by 28 U. S. C. § 2324: "The pendency of an action to enjoin, set aside, annul, or suspend any order of the Interstate Commerce Commission shall not of itself stay or suspend the operation of the order, but the court may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the action." But an injunction forbidding the railroads from implementing a proposed change in rates is not, strictly speaking, an injunction suspending the Commission's order. In this case, for example, the Commission's order stated, "the proposed new or increased charges for in-transit inspection of grain at various points in the United States are just and reasonable. . . ." The only consequence of suspending that order is that the railroads may not rely, in some subsequent proceeding, on a Commission finding that the proposed rates were just and reasonable. In an action for reparations, for example, the railroads could not gain any benefit from

the purported Commission approval of the increases.[13] See *Arizona Grocery Co.* v. *Atchison, T. & S. F. R. Co.*, 284 U. S. 370 (1932). See also 49 U. S. C. §§ 1 (5), 10 (1). The Commission's order also provided that the proceeding be discontinued, and suspension of the order requires the Commission to reopen its inquiry.

Carriers may put into effect any rate that the Commission has not declared unreasonable. 49 U. S. C. §§ 6 (3), 15 (1). Suspension of the Commission's order thus does not in itself preclude the carriers from implementing a new rate. The power conferred on the District Court by § 2324 does not in itself include a power to enjoin the railroads from implementing a proposed new charge. Rather, that power must be considered as at best ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction. See *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S., at 671 n. 22; *Order of Conductors* v. *Pitney*, 326 U. S. 561, 567 (1946). Cf. *Pittsburgh & W. Va. R. Co.* v. *United States*, 281 U. S. 479, 488 (1930); 28 U. S. C. § 1651 (a). As this Court noted in *Scripps-Howard Radio, Inc.* v. *FCC*, 316 U. S. 4 (1942), such a power must be inferred from Congress' decision to permit judicial review of the agency action. "If the administrative agency has committed errors of law for the correction of which the legislature has provided appropriate resort to the courts, such judicial review would be an idle ceremony if the situation were irreparably changed before the correction could be made." *Id.*, at 10.

Yet it would be surprising if that power could be exercised to the extent that it might substantially interfere with the function of the administrative agency. "The

[13] The Commission may, of course, approve the rates on a theory similar to that discussed in Part II of this opinion, justifying its refusal to require a showing of reasonableness by the fact that that question would be open in subsequent proceedings. A suspension of the Commission order would then have almost no practical meaning.

existence of power in a reviewing court to stay the enforcement of an administrative order does not mean, of course, that its exercise should be without regard to the division of function which the legislature has made between the administrative body and the court of review." *Ibid.* Proper regard for that division of function requires that we hold erroneous the District Court's decision to enjoin not only the Commission's order finding the proposed rates just and reasonable but also the implementation of those rates.

In *Arrow Transportation Co.* v. *Southern R. Co., supra,* this Court considered a similar problem. The Interstate Commerce Commission has the power to suspend proposed rate changes for seven months, while it proceeds to consider the reasonableness of the proposal. "If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate . . . shall go into effect at the end of such period." 49 U. S. C. § 15 (7). In *Arrow,* parties affected by proposed reductions sought an injunction against the implemention of the proposed reductions when, at the end of the suspension period, the railroads announced that they intended to put the new rates into effect. The Commission had not determined that those rates were reasonable. The Court concluded that Congress, by giving the Commission the power to suspend rates, had intended to preclude the courts from doing the same.

Here, of course, the Commission's proceeding has been concluded, or at least so the Commission thought when it entered its order. The terms of § 15 (7) do not specifically govern this situation. Nor is there any other provision in the relevant statutes depriving federal courts of their general equitable power to preserve the status quo to avoid irreparable harm pending review. Yet many of the considerations, relied on in *Arrow* and influencing this Court's definition of the proper relation between the courts and the Interstate Commerce Commission,

must be drawn on to delineate guidelines for the exercise of the ancillary power, in a proceeding to review a Commission order, to enjoin a rate increase pending final determination of the suit.

The most important of these considerations is the group of policies that are encompassed by the term "primary jurisdiction." National transportation policy reflects many often-competing interests. Congress has established an administrative agency that has developed a close understanding of the various interests and that may draw upon its experience to illuminate, for the courts, the play of those interests in a particular case. Cf. *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922); *United States* v. *Western Pacific R. Co.*, 352 U. S. 59 (1956). Ordinarily, then, a court should refrain from expressing a preliminary view on what national transportation policy permits, before the ICC expresses its view. But when a court issues an injunction pending final determination, one important element of its judgment is its estimate of the probability of ultimate success on the merits by the party challenging the agency action. *Virginia Petroleum Jobbers Assn.* v. *FPC*, 104 U. S. App. D. C. 106, 259 F. 2d 921, 925 (1958). Depending on the type of error the reviewing court finds in the administrative proceedings, the issuance of an injunction pending further administrative action may indicate what the court believes is permitted by national transportation policy, prior to an expression by the Commission of its view. This is precisely what the doctrine of primary jurisdiction is designed to avoid. Cf. *Order of Conductors* v. *Pitney, supra; Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528, 533 (1960). The fact that issuing an injunction may undercut the policies served by the doctrine of primary jurisdiction is

therefore an important element to be considered when a federal court contemplates such action.[14]

As we have indicated in Part II of this opinion, we require the agency to justify its departure from its prior decisions so that we may understand what policies it is pursuing. If a reviewing court cannot discern those policies, it may remand the case to the agency for clarification and further justification of the departure from precedent. But an injunction pending the completion of those proceedings would be warranted only if the reviewing court entertained substantial doubt about the consistency of the Commission's action with its mandate from Congress. Cf. *Virginian R. Co.* v. *United States*, 272 U. S. 658, 673 (1926).[15] When a case is remanded

[14] *Brotherhood of Locomotive Engineers* v. *M.-K.-T. R. Co.*, 363 U. S. 528 (1960), shows that not all judicial injunctions infringe on an agency's primary jurisdiction. There the Court noted that the District Court's "examination of the nature of the dispute is so unlike that which the [agency] will make of the merits of the same dispute, and is for such a dissimilar purpose, that it could not interfere with the later consideration of the grievance by the [agency]." *Id.*, at 534. Here, in contrast, the District Court must consider whether the Commission is likely to find reasons for its action that are consistent with congressional policy. Not only is such a question exceedingly complex, it is also just what the Commission itself must decide before approving the proposed new charges.

[15] In some cases, the reviewing court might explicitly refrain from considering the likelihood of success on the merits in deciding whether or not to issue an injunction. Then, if the possibility of irreparable damage to the party seeking review or to other interests is great enough, an injunction may perhaps be justified. See, *e. g.*, *Semmes Motors, Inc.* v. *Ford Motor Co.*, 429 F. 2d 1197, 1205–1206 (CA2 1970); *Checker Motors Corp.* v. *Chrysler Corp.*, 405 F. 2d 319, 323 (CA2 1969). In this case, however, the District Court did not clearly refuse to assess the likelihood of ultimate success and, as indicated *infra*, the possibility of irreparable harm to the shippers is quite small.

on the ground that the agency's policies are unclear, an injunction ordinarily interferes with the primary jurisdiction of the Commission.[16] Cf. *Arrow Transportation Co.* v. *Southern R. Co., supra,* at 669–670.

In addition, the reviewing court must consider whether irreparable harm will result if the injunction is not issued and the party seeking it prevails on the merits. *Order of Conductors* v. *Pitney, supra.* That too may interfere with the agency's primary jurisdiction. We deal here with a dispute between shippers and carriers. In

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[16] This analysis turns on the fact that type of error in this case involves precisely a failure by the Commission to do the job committed to it, the proper performance of which is a predicate of the doctrine of primary jurisdiction. Where the error might be considered purely procedural, for example, where the Commission failed to consider relevant evidence on grounds the reviewing court finds inadequate, the issuance of an injunction might not interfere with the agency's primary jurisdiction quite so severely. Yet even there, before issuing an injunction the reviewing court must consider whether the Commission would have come to a different conclusion had it considered the evidence. And that may sometimes impinge on the sphere committed to the Commission for initial decision.

This Court has distinguished between blatantly lawless action and mere procedural error in cases raising similar questions of the power of courts to intervene in administrative action. See *Oestereich* v. *Selective Service Board,* 393 U. S. 233 (1968); *Fein* v. *Selective Service System,* 405 U. S. 365 (1972).

Different considerations would come into play, too, when the reviewing court finds some failure by the carriers in the suspension proceeding, rather than a failure by the Commission to do its task. A reviewing court might find, for example, that the Commission's conclusion that the carriers had carried the burden of proof to justify the increase was not supported by substantial evidence. Although phrased as a finding of administrative error, this in fact relates to the presentation of evidence by the carriers.

Finally, this case involves only claims under the Interstate Commerce Act. Subsequent legislation might affect the relation between court and agency and so the propriety of injunctive relief. Whether it does so must be determined by examining that legislation.

giving the Interstate Commerce Commission power to suspend proposed rate increases, Congress allocated the benefit and harm of a suspension. For a period of up to seven months, the carriers may not collect the increases if the Commission suspends them. The income that they might have gained is lost to them forever. Congress did provide protection to shippers for the period after the rates go into effect. The Commission may require the carriers to keep detailed accounts of the income received as a result of the increase. If the increase is ultimately found unjustified, the Commission may order a refund. 49 U. S. C. § 15 (7). Even if the Commission does not do so in a suspension proceeding, the shippers may recover reparations under some circumstances. 49 U. S. C. §§ 8, 9. Thus, it is often quite unlikely that shippers will be irreparably damaged by the implementation of a rate increase.[17]

There are, however, public interests at stake in this litigation, as well as the private interests of the shippers and carriers. The Commission found that inspection of grain is required for the orderly marketing of grain. 339 I. C. C., at 385. Inspections will thus continue to be made. But now, if the Commission ultimately approves the new charges, there will be a separate charge for them, either by the railroads under the new charges, or by someone else engaged in marketing grain. This extra cost must be absorbed by someone, perhaps by farmers, perhaps by the ultimate consumers of grain. See Transcript of Hearing 1299. The impact of rates on various

[17] The interests of other carriers who might object to a proposed rate change are somewhat different. They are not damaged, as the shippers are, by out-of-pocket expenditures, and refunds or reparations do not remedy the loss of business that they might suffer. This factor would thus have less weight in suits by such carriers, although the problem of interfering with primary jurisdiction must still be considered.

groups in this country is surely relevant to deciding that the rates are consistent with national transportation policy.

But the public interest is not a simple fact, easily determined by courts. Here, for example, the interests of farmers and consumers of grain must be balanced against the interests of producers and consumers of all sorts of other goods shipped by rail. For the premise of the Commission's action in this case was that separate charges for in-transit inspections would alleviate the freight car shortage. The shortage itself increases the cost of transporting a wide range of products by rail. Thus, the decision that must be made is whether the car shortage has a more significant impact on the national economy than does increased cost for grain products. Congress has committed that decision to the Interstate Commerce Commission in the first instance, and the extent of harm to farmers and consumers of grain cannot be estimated without interfering with the primary jurisdiction of the Commission.[18]

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[18] Although they are far less substantial than the problems of primary jurisdiction and irreparable injury, procedural problems might also arise when a district court considers a request for an injunction like that issued in this case. Review of Commission orders is by a three-judge district court. The United States is the defendant. 28 U. S. C. §§ 2321, 2322. Railroads who appeared before the Commission have a right to intervene, 28 U. S. C. § 2323, but they need not do so. If a railroad chose not to intervene, the District Court could not enjoin it from implementing the new charge. The plaintiffs could, of course, compel an unwilling railroad to appear. Fed. Rules Civ. Proc., Rule 19 (a). But, even though service of process is nationwide, 28 U. S. C. § 2321, some plaintiffs might find it difficult to serve every railroad that did not appear willingly. The presence before the reviewing court of all interested parties, or only some of them, is therefore relevant to the exercise of the court's discretion to enjoin a proposed rate increase. Like the other factors discussed in this opinion, this does not establish that the District Court lacks power to enjoin the implementation of proposed rate increases after a final Commission order, but it is a

As this discussion shows, it is very likely that a decision to enjoin rates pending reconsideration by the Commission in order to clarify its policies will imply some view by the District Court about decisions committed to the Commission by the doctrine of primary jurisdiction. The District Court's power to enjoin rates, in order to protect its jurisdiction to review Commission orders, must therefore be exercised with great care and after full and detailed consideration of the problems set out above. It will not do to enter such an injunction in the offhanded manner of the District Court. Cf. *Virginian R. Co.* v. *United States*, 272 U. S. 658 (1926). Here the District Court could not consider the likelihood of success on the merits or where the public interest lies without infringing on decisions committed by Congress to the primary jurisdiction of the Interstate Commerce Commission, and the possibility of harm to the shippers was small. It was therefore improper to enter an injunction against the implementation of the proposed new charges.

In this case the Commission ordered the railroads to maintain records of the amounts collected as a result of the new charge. It may be that this adequately protects the shippers from irreparable damage, in light of the availability of actions for reparations. The Commission may determine on remand that some further steps must be taken to protect the shippers. But in any event, it is clear that the District Court should not have entered the injunction it did. The action of the District Court is affirmed as to the remand to the Commission and is reversed as to the injunction suspending the proposed charges.

So ordered.

MR. JUSTICE POWELL took no part in the consideration or decision of these cases.

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factor to be considered in determining whether to exercise equitable discretion to issue such an injunction.

SUPREME COURT OF THE UNITED STATES

Nos. 72-214 AND 72-433

The Atchison, Topeka and Santa Fe Railway Company et al., Appellants,
72-214 *v.*
The Wichita Board of Trade et al.

Interstate Commerce Commission, Appellant,
72-433 *v.*
Wichita Board of Trade.

On Appeals from the United States District Court for the District of Kansas.

[June 18, 1973]

MR. JUSTICE DOUGLAS, concurring in the affirmance of the remand to the Commission and dissenting from the reversal of the decree authorizing the injunction.

In my view the District Court was quite correct in issuing its injunction. *Arrow Transportation Co.* v. *Sou. R. Co.*, 372 U. S. 658, is not relevant here, for the reason that § 15 (7) only purports to control the suspension of rates up until the time the Commission has rendered a decision. After that decision has been made, the reviewing court has, I believe, the power to enjoin the affected rates. The new charges which the Commission would impose would have an immediate impact upon the grain marketing system. It would affect the volume of business of the grain merchants, it would affect the employment of grain inspectors, and it would result in lower prices being paid to the farmers. None of these incidences can be remedied under the existing statutory scheme, because none of these interests is enabled to

bring suit for a later rate refund. Hence, in my view, the grain trade and the farmers need this interim protection lest in inspection the marketing system suffers severe attrition during the period of remand. The deciding principle is that the District Court sits as a court of equity, *United States* v. *Morgan*, 307 U. S. 183, 191, and as a court of equity has, I believe, ample power to protect the grain market nationally which would otherwise be without remedy under the existing statutory regime.

Jurisdiction is granted the District Court "to enforce, enjoin, set aside, annul or suspend" any order of the Interstate Commerce Act. 28 U. S. C. § 1336 (a). For years the type of order here involved* was not reviewable. See *Proctor & Gamble Co.* v. *United States*, 225 U. S. 282. But that "negative" order concept was abandoned in *Rochester Tel. Corp.* v. *United States*, 307 U. S. 125, 145. The provisions of the Urgent Deficiencies Act, 28 U. S. C. § 1336 (a), are an explicit grant of power to provide injunctive relief. Under that Act the "governing principle" is "that it is the duty of a court of equity granting injunctive relief to do so upon conditions that will protect all—including the public—whose interests the injunction will effect." *Inland Steel Co.* v. *United States*, 306 U. S. 153, 157. That power exists whether the Commission's authority over rates is challenged under 49 U. S. C. § 15 (1) as being unjust or unreasonable or under 49 U. S. C. § 15 (7) relating, as here, to "a new individual or joint rate, fare or charge." In all cases the District Court by reason of 28 U. S. C. § 1336 (a) sits as a court of equity.

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*The order of Division 2 of the Commission provided that the proceeding "be, and it is hereby, discontinued." 339 I. C. C. 364, —. The order of the Commission *en banc* affirming is in 340 I. C. C. 69, —.

SUPREME COURT OF THE UNITED STATES

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[June 18, 1973]

MR. JUSTICE WHITE, with whom MR. JUSTICE BRENNAN and MR. JUSTICE REHNQUIST join, concurring in the reversal of the injunction and dissenting from the affirmance of the remand to the Commission.

I dissent because the District Court erred both in holding that the Commission had inadequately explained the basis for its judgment and in suspending the new in-transit inspection tariff beyond the time the statute permits new rates to be suspended without a finding that they are unjust and unreasonable.

As to the latter, 49 U. S. C. § 15 (7) forbids the suspension of new freight rates for more than seven months without the requisite finding of unreasonableness by the Commission. Only the Commission may suspend in the first instance; and if the agency refuses to do so, the court is powerless itself to suspend. The Commission may postpone effectiveness of new rates for seven months, but if it does, the statute commands that, absent the appropriate order of the Commission within that period, "the proposed change of rate . . . shall go into effect . . . ." To permit the District Court neverthe-

less to extend this period seems to me to be flatly contrary to the will of Congress. I therefore cannot join the Court's indication that, although the District Court has no statutory power to do so, it nevertheless retains sufficient power to enjoin the rates as "ancillary to the general equitable powers of the reviewing court, and protective of its jurisdiction." *Ante*, p. 18. As I see it, the District Court contravened the precepts of *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658 (1963).

As for the remand to the Commission, there is somewhat more to be said. The Commission found, and it is not questioned by the District Court or by the majority here, that in-transit inspection of grain is not an essential part of transportation service but only ancillary to it; that the premarketing inspection of grain, in transit or otherwise, is no longer required by federal law; that in-transit inspection of grain has been the regular practice in Western territory, to some extent in Southern territory, but not in Eastern territory; that the line-haul rates for grain in Western and Southern territories established by the railroads or prescribed by the Commission have provided one free in-transit inspection stop, but a separate charge for that service is the practice in Eastern territory;[1] and that, because of recent developments in-

[1] The Commission noted:

"It is again emphasized that the major impact of the proposal under consideration will be on the movement of grain in the western district. Most inspections occur in this territory. There is presently effective a separate charge for this service in the East. A substantial increase in those charges will result, however, if the proposed charges are permitted to become effective. The number of in-transit inspections in the South is limited and take place chiefly at the ports on export grain tonnage. There is little, if any, opposition to establishment of the charges in southern territory. Practically all of the controversy is concerned with establishment of the separate charge for the first inspection of grain within the western district."

transit inspection is no longer an essential service for the orderly marketing of grain in Western and Southern territories. Furthermore, the unquestioned finding of the Commission was that the principal motivation for imposing a separate charge for in-transit grain inspection was not to increase railroad revenues through collection of the charge itself but to promote efficient utilization of freight cars by discouraging the practice of in-transit inspection which had proved extremely wasteful in terms of car utilization. The Commission finding, also undisturbed, was that the separately stated inspection fee would discourage the practice of in-transit inspection, would contribute to a more efficient utilization of freight cars, and hence help relieve the unquestioned grain-car shortage.

With these important preliminary findings and conclusions behind it, the Commission examined in detail the reasonablenes of the separate charge being imposed for in-transit inspection of grain. Its conclusion was that the charge was reasonable, a judgment not overturned either here or in the District Court. Finally, the Commission noted that by the terms of the new tariff itself, separate in-transit inspection charges could not be collected where the combination of the new, separate charge and the existing line-haul rate exceeded the maximum reasonable level of grain rates established in Docket 17,000, Part 7, *Rate Structure Investigation, Grain and Grain Products*, 205 I. C. C. 301 (1934); 215 I. C. C. 83 (1936), as raised by subsequent general revenue increases. Docket 17,000, Part 7, *Rate Structure Investigation*, was a major national effort, a comprehensive investigation of rates on agricultural products, and resulted, among other things, in the Commission prescribing maximum reasonable freight rate levels for movements of grain. Since that time, there have been general rate increases for revenue purposes, in the course of which

the rates on grain and their structure as required by the 1934 and 1936 determinations have been given special attention. See for example, *Increased Freight Rates, 1967*, 332 I. C. C. 280, 300 (1968).

Under the new tariffs now filed, as I have said, if the applicable line-haul rate on the particular grain movement involved is at the maximum reasonable level theretofore prescribed by the Commission in previous proceedings, no separate in-transit inspection charge is imposed or allowable, nor may the combination of the new charge and the existing line-haul rate collected by the railroad exceed the maximum allowable rate as previously determined. This is the key to understanding that, in approving the separate inspection charge, the Commission did not ignore its longstanding rule that railroads may not impose separate charges for an ancillary service previously furnished under a line-haul rate unless both the reasonableness of the separate charge and the line-haul rate are scrutinized. *Transit Charges, Southern Territory*, 332 I. C. C. 664, 683–684 (1968), is, for example a relatively recent restatement of the rule.[2] The Commission thought this rule not controlling here because, in the first place, the magnitude of the task of justifying each one of a countless number of line-haul grain rates would, as a practical matter, prohibit the imposition of a separate in-transit inspection charge and so frustrate the important nonrevenue goal of discouraging in-transit inspection and so improving car utilization.

[2] The Commission's order was sustained, on other grounds, in *Cin. N. O. & T. P. Co.* v. *United States* (unreported) (SD Ohio 1970), aff'd 400 U. S. 932 (1970). The District Court sustained the Commission on the basis that the proposed increase in charges might well result in a substantial diversion of the considered traffic, with a diminution, rather than an increase, in revenues. In the present case, the Commission noted: "Similar conclusions are not warranted here."

But more fundamentally, the Commission in any event deemed the rule satisfied; for here the reasonableness of the line-haul rate was sufficiently examined and ensured by proof that the new charge was itself reasonable *and* by prohibiting its collection if the total cost of the grain movement—its line-haul charge plus the separate inspection charge—exceeded the maximum reasonable rate theretofore prescribed by the Commission, that is, the maximum reasonable rate the Commission had *theretofore prescribed for both the transportation service and the privilege of in-transit inspection.*

This approach seems straightforward and adequate. Keeping in mind that Docket 17,000, Part 7, as was customary in Western territory, prescribed rates for grain movements permitting one in-transit inspection without extra charge, let us assume, for example, that the maximum rate prescribed by the Commission for a particular grain movement with in-transit inspection privileges was 120. Assume further what is the recurring situation in the case before us—that the railroad is charging less than it may, say 100, for the grain movement with that privilege. The railroad then publishes a tariff under which the line-haul rate of 100 no longer entitles the shipper to in-transit inspection, and a separate charge of 20 is imposed on those who want that service. The line-haul charge plus the separate in-transit inspection charge does not exceed what the Commission has heretofore ruled the railroad may collect for both the transportation and the inspection service. This calculus seems to me an adequate basis for concluding that the line-haul rate of 100 is itself within the zone of reasonableness. If a railroad may charge 120 for a grain movement with in-transit inspection provided, and the inspection stop is proved reasonably worth 20, why should there also be occasion for considering the reasonableness of 100 as a

line-haul rate and so proving again what the Commission previously found—that 120 is a reasonable charge for both services?

The District Court thought the Commission ignored *Secretary of Agriculture* v. *United States*, 347 U. S. 645 (1943), but I read that case far differently. There the Court, although being of the opinion that the Commission had not adequately explained why it was approving a separate charge without examining the legality of the line-haul rate, was careful to point out that the Commission was not precluded "from following a procedure fairly adapted to the unique circumstances of this case"; nor did the court question "the Commission's power, under appropriate findings, to approve such unloading charges without pursuing one of these courses. In dealing with technical and complex matters like these, the Commission must necessarily have a wide discretion in formulating appropriate solutions." *Id.*, at 652. That case does not stand for the rule that a separate charge for an ancillary service may in no circumstances be permitted without new proof in *that* proceeding of the reasonableness of the line-haul rate.

The prior decisions of the Commission relied upon by the District Court establish clearly enough that the Commission must be satisfied with the reasonableness of the line-haul rate as an exaction for the remaining services before approving a separate charge for a service previously covered by the line-haul rate. *Transit Charges, Southern Territory*, 332 I. C. C. 664 (1968); Investigation and Suspension Docket No. 5146, *Terminal Charges at Pacific Coast Ports*, 255 I. C. C. 673 (1943); *Reconsignment Case No. 3*, 53 I. C. C. 455 (1919); *Loading of Less-Than-Carload Freight on Lighters in Norfolk, Va., Harbor*, 91 I. C. C. 394 (1924). In these cases, the carriers simply failed to carry their burden of proof.

The District Court also cited for this proposition *Grand Forks Chamber of Commerce et al.* v. *Great Northern R. Co.*, 321 I. C. C. 356 (1963), but the Commission in that case, see *id.*, at 360–362, did precisely what it has done in this one: it approved a separate in-transit inspection charge in the case of so-called Group 3 rates where the line-haul rate and the new charge together were less than so-called Group 1 rates prescribed in *Grain and Grain Products*, 205 I. C. C. 301, 315 I. C. C. 83, *supra*. See also *Public Service Comm'n* v. *Great Northern R. Co.*, 340 I. C. C. 739; *Alabama State Docks Dept.* v. *Alabama, T. & N. R. Co.*, 321 I. C. C. 347; *Agsco Chemicals* v. *Alabama G. S. R. Co.*, 314 I. C. C. 725.

Neither do I understand why the majority is comforted by the opinion in *Cincinnati N. O. & T. P. R. Co.* v. *United States*, — F. Supp. — (SD Ohio 1970), in which the District Court affirmed, but on very limited grounds (grounds that would save the case before us now), the Commission's disallowance of a separate transit charge for cotton movements but disapproved the stringent standard by which the Commission required the railroads to prove the reasonableness of the resulting line-haul rate. The District Court restated the prevailing rubric:

> "The question here is what should the carrier be paid for a service which it has been rendering, and has been charging for, and has been paid for (one knoweth not what) which it proposes to separate and charge separately for. Both the courts and the Commission have consistently held that what is a just and reasonable rate for the service to be separated and charged for separately cannot be determined by examining only the typical questions of cost, etc., with respect to the separate service. On the contrary, the typical questions must be directed

to the overall or combined picture so that one may conclude (a) that the rate for the separated service, looked at by itself in the light of the applicable questions, is just and reasonable; and (b) that the remaining rate for the services, sans the separated service, is not rendered unjust or unreasonable."

The District Court continued:

"Whether the examination is in terms of "what portion of the line-haul rate represented the rate for the service to be separated,' or whether the search in terminology is for the answer to this question: *Does the new aggregate rate, composed of line-haul plus transit rates represent a just and reasonable rate for all of the services (the aggregate of the severed and the nonsevered)—the principle is the same.*" (Emphasis added.)

A few paragraphs later, the court repeated the same alternate approach. This Court affirmed the District Court summarily. 400 U. S. 932 (1970). In the case now before us the total of the line-haul rate and the separate in-transit charge will in no case exceed what the Commission has heretofore found to be a reasonable charge for the aggregate service.

The maximum permissible rates for grain movements with in-transit inspection privileges were established some years ago it is true, but they have been subject to repeated examination upon the occasions of general rate increases and, as this case itself shows, they are far from dead letters from the standpoint of either the railroads or the Commission. They remain the foundation of the Commission's opinion as to what just and reasonable grain rates are with in-transit privileges furnished by the railroad. I see no reason for now disagreeing with the Commission's judgment that the reasonableness of a line-haul rate lower than the maximum allowable

has been sufficiently re-examined to permit imposition of a separate in-transit inspection charge, in itself found reasonable, when it is also determined that the existing line-haul rate and the new inspection charge together total less than the maximum Commission-prescribed rate for the two services combined. Surely this presents an inadequate occasion or context in which to frustrate what the Commission found to be a promising effort to solve a critical problem—the freight car shortage—by seeking to deter a wasteful practice not indispensable or even, in the Commission's view, unusually important to the orderly marketing of grain under modern conditions.

For these reasons, I respectfully dissent.